(1)

88-280

No. _____

IN THE
SUPREME COURT OF THE
UNITED STATES

Supreme Court, U.S.
FILED
AUG 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

October Term, 1988

MICHAEL F. MCCARTHY and
HAROLD T. OKAHARA
Petitioners

vs.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL A. WEIGHT
Attorney at Law
A Law Corporation
Suite 430
735 Bishop Street
Honolulu, Hawaii
96813
(808)528-3255

Counsel of Record
for Petitioner
HAROLD T. OKAHARA

Of Counsel:
REINWALD, O'CONNOR,
MARRACK, HOSKINS &
PLAYDON

DENNIS EDWARD WATSON
O'CONNOR
JERROLD K. GUBEN
CHARLES EDWARD MCKAY
2400 PRI Tower
733 Bishop Street
Honolulu, Hawaii
96813
(808)524-8350

Counsel of Record
for Petitioner
MICHAEL F. MCCARTHY

QUESTIONS PRESENTED

(1). Is it a violation of the Fifth Amendment prohibition against Double Jeopardy to try petitioners for mail fraud when a trial court has already tried and acquitted them of participating in the underlying scheme to defraud?

(2) Notwithstanding the Fifth Amendment, is the government estopped from retrying the question of whether petitioners participated in a scheme to defraud --- when (a) that issue was squarely before the trial court; and (b) the court explicitly ruled there was no such participation?

(3). Did the trial court properly dismiss 29 mail fraud counts prior to trial when the 29 "mailings" in issue (a) consisted of pre-addressed envelopes

with no enclosures; (b) were sent as part of a pre-existing legal obligation; and (c) did not contain any misrepresentations?

PARTIES TO THE PROCEEDING

The parties to the proceeding were the United States, Defendant Michael F. McCarthy and Defendant Harold T. Okahara.

Defendants Curtis J. Bernhardt, Carl J. Bernhardt, and Daniel R. Matsukage were indicted together with McCarthy and Okahara. However, trial was bifurcated and McCarthy and Okahara proceeded to trial first.

The Bernhardts have not been tried and the arguments based on the Double Jeopardy Clause do not pertain to them. Matsukage is now deceased.

TABLE OF CONTENTS

PAGE

OPINIONS BELOW..... 3

JURISDICTION..... 4

CONSTITUTIONAL AND STATUTORY PROVISIONS..... 4

STATEMENT OF THE CASE..... 5

REASONS FOR GRANTING THE PETITION. 13

A. Retrial Of Petitioners On Any Part Of The Indictment Will Violate The Double Jeopardy Provisions Of The Federal Constitution..... 14

B. Decisions of this Court and other Circuits; Estoppel... 18

C. Sufficiency of the Indictment. 24

CONCLUSION..... 26

APPENDICES

PAGE

A. Opinion of the United States Court of Appeals, Ninth Circuit filed on February 25, 1988.....A-1

B. Order of the United States Court of Appeals, Ninth Circuit filed on March 30, 1988.....B-1

C. Order of the United States Court of Appeals, Ninth Circuit filed on April 5, 1988.....C-1

D. Order of the United States Court of Appeals, Ninth Circuit filed on April 8, 1988.....D-1

E. Order of the United States Court of Appeals, Ninth Circuit filed on April 8, 1988.....E-1

F. Order of the United States Court of Appeals, Ninth Circuit filed on June 16, 1988.....F-1

G. Pages 43 thorugh 48 of the Transcript of the Judgment of Acquittal Arguments held on September 30, 1985 before the Honorable Walter E. Craig.....G-1

TABLE OF AUTHORITIES

PAGE

CASES

Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 11189, 25 L.Ed.2d 469 (1970)..... 19

Carter v. Estelle, 677 F.2d 427 (1982)..... 20

Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960)..... 24

Pereira v. United States, 347 U.S. 1, 74 S.Ct. 358, 363, 98 L.Ed.2d 435 (1954)..... 25

Sedgwick v. Superior Court for the District of Columbia, 584 F.2d 1044 (D.C. Cir. 1978)..... 20

United States v. Allen, 539 F.Supp. 296 (C.D. Ca., 1982)..... 21

United States v. Baugus, 761 F.2d 506 (8th Cir. 1985)..... 20

United States v. Beecroft, 608 F.2d 753 (9th Cir. 1979)..... 18

United States v. Brutzman, 731 F.2d 1449 (9th Cir. 1984)..... 15

United States v. Genser, 710 F.2d 1426 (10th Cir. 1983)..... 21

United States v. Maker, 751 F.2d 614 (3d Cir. 1984)..... 21

United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977)..... 19

United States v. Mitchell, 744 F.2d 701 (9th Cir. 1984)..... 14

United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978)..... 19

STATUTES

18 U.S.C. Section 371.....4, 5
18 U.S.C. Section 1341....4, 5, 6, 24
18 U.S.C. Section 1343..... 5
18 U.S.C. Section 3731..... 17
28 U.S.C. Section 1254(1)..... 4

IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1988

MICHAEL F. MCCARTHY
and HAROLD T. OKAHARA
Petitioners

vs.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Michael F. McCarthy and Harold T. Okahara pray that this Court exercise its supervisory powers to review a set of related orders entered by the Ninth Circuit Court of Appeals. The effect of the appellate rulings is that the petitioners now face mail fraud charges based upon a "scheme to defraud" for which they have already been tried and acquitted.

The Ninth Circuit's pronouncements on this matter have been unusually convoluted, internally inconsistant and confusing. The petitioners request certiorari to review the following appellate orders, all of which concern the same subject matter:

(a) the initial Opinion of the appellate court filed on February 25, 1988 (Appendix A);

(b)the March 30, 1988 Order pertaining to the "standing" of McCarthy and Okahara (Appendix B);

(c) the April 5, 1988 Order amending the Februrary 28, 1988 opinion (Appendix C);

(d) the April 8, 1988 Order amending the March 30, 1988 Order (Appendix D);

(e) the April 8, 1988 Order further amending the April 5, 1988 Order and the February 28, 1988 opinion (Appendix E); and

(f) the June 16, 1988 Order in which the Ninth Circuit denied a petition for rehearing with suggestion of rehearing en banc (Appendix F).

OPINIONS BELOW

The Amended February 25, 1988 Opinion of the Ninth Circuit Court of Appeals (Appendix A) is reported at 840 F. 2d 1441 (9th Cir. 1988). The March 30, 1988; April 5, 1988; April 8, 1988 Orders (concerning the petition for rehearing and amendments to the February 25, 1988 Opinion) are not reported. The June 16, 1988 order denying rehearing is also not reported.

JURISDICTION

The Opinion of the Ninth Circuit Court of Appeals was entered on February 25, 1988. A timely petition for rehearing with suggestion for rehearing en banc was denied on June 15, 1988, and this petition for certiorari was filed within 60 days of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), and the Fifth Amendment of the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners were initially charged with offenses under 18 U.S.C. Section 371, 1341 and 1343. Only the offenses under Section 1341 (mail fraud) are at issue here. Petitioners' Fifth Amendment arguments pertain to the Double Jeopardy clause which provides that no person shall be "subject for the same offense to be twice put in jeopardy of life or limb".

STATEMENT OF THE CASE

On March 17, 1985, Curtis J. Bernhardt, Carl J. Bernhardt, Daniel R. Matsukage, Michael F. McCarthy, and Harold T. Okahara were charged in the United States District Court for the District of Hawaii with violations of 18 U.S.C. 371 (conspiracy), 18 U.S.C. 1341 (mail fraud) and 18 U.S.C. 1343 (wire fraud). The charges were brought in a 74 Count superceding indictment (the "indictment"). Count 1 alleged a conspiracy to commit fraud. Counts 2 through 74 described 73 alleged instances in which the mails or wires were used to further the scheme to defraud.

Prior to trial, Counts 2 thorugh 30 (describing 29 instances where the mails were used) were dismissed for failing to

state an offense against the United States. The trial court found that the mailings in Counts 2 through 30 were the result of a pre-existing legal obligation and were not sufficiently related to the underlying scheme to defraud to bring them within the reach of 18 U.S.C. 1341.

Trial was then bifurcated, with McCarthy and Okahara proceeding first. The Bernhardts were to be tried separately (and have not yet gone to trial). Matsukage is now deceased. In July and August, 1985 the government presented its case against McCarthy and Okahara.

After nine weeks of testimony and evidence from prosecution witnesses, at the conclusion of the government's case against McCarthy and Okahara, the petitioners moved for entry of a

judgment of acquittal. The trial court granted the motion and acquitted McCarthy and Okahara of all pending charges.

In doing so, the trial court specifically found that McCarthy and Okahara did not participate in the alleged conspiracy described in Count 1. More importantly, the trial court expressly found that the defendants did not participate in the underlying scheme to defraud. The pertinent portion of the trial court's findings is attached as Appendix G.

For purposes of this petition, it is critically important to note that there was a single alleged scheme to defraud which was common to <u>every</u> count of the indictment --- both the counts on which the defendants were tried as well

as the twenty nine counts which were dismissed prior to trial.

Count 1 (conspiracy) described the object of the conspiracy and the ways and means allegedly used to effectuate it. The 73 subsequent counts were collectively prefaced with the phrase "for the purpose of executing the aforesaid scheme and artifice to defraud". The indictment then went on to list the dates and adressees for the mailings, with each mailing constituting a separate count. Thus, Count 1 and Counts 2 through 74, by explicit reference, referred to a singular "scheme to defraud". The trial judge specifically found that the petitioners did not participate in that scheme to defraud.

The government initially appealed both the judgment of acquittal and the

pre-trial dismissal of Counts 2 through 30. The appeal of the judgment of acquittal was voluntarily dismissed. The government maintained its appeal pertaining to Counts 2 through 30.

Because the dismissal of Counts 2 through 30 occurred before trial was bifurcated, the trial court's ruling necessarily concerned all five defendants (Curtis Bernhart, Carl Bernhardt and Daniel Matsukage, as well as McCarthy and Okahara). This is probably where the confusion began.

The Ninth Circuit issued an initial opinion on February 25, 1988 stating that "collateral estoppel" did not bar the government from trying all the defendants on Counts 2 through 30. McCarthy and Okahara immediately filed a petition for rehearing, arguing (a) the trial court's rulings were determinative

as to these petitioners and did estop the government from retrying the same issue; and (b) regardless of the court's position on the estoppel question, the Fifth Amendment prohibition on double jeopardy absolutely prevented a second trial.

The basis of the petitioners' argument was simple. They, unlike the Bernhardts and Matsukage, had actually been tried. Jeopardy had attached and the trial court explicitly found that the petitioners had not participated in the underlying scheme to defraud. Under these circumstances, the Ninth Circuit's sweeping remarks about collateral estoppel may pertain to the other defendants but the appellate court's analysis should not and cannot apply to McCarthy and Okahara.

Apparently as a result of the petition for rehearing, the Ninth Circuit issued an order commanding the government to file a responsive brief. In doing so, the appellate court, sua sponte, directed the government to address McCarthy and Okahara's "standing" to participate in the appeal. (March 30, 1988 Order attached as Appendix B). This was followed by an amendment to the initial Opinion which stated that collateral estoppel did not bar the trial of the other defendants, Curtis and Carl Bernhardt. (June 5, 1988 Order attached as Appendix C). These amendments gave the clear impression that McCarthy and Okahara were viewed differently from the Bernhardts and would not be retried, obviously because of the adjudication on the merits in the lower court.

The Ninth Circuit then did an about face, issuing on June 8, 1988 a pair of Orders. The first directly contradicted the March 30, 1988 order, stating that there was no issue as to McCarthy's and Okahara's "standing". (Appendix D). The second order was in effect the third permutation of the February 25, 1988 Opinion. Whereas the second revision of the Opinion stated there was no bar to retrying the Bernhardts, the third redraft stated that collateral estoppel did not bar trial for <u>any</u> of the defendants, including the petitioners. (Appendix E). Finally, on June 16, 1988, the court of appeals summarily denied denied the request for rehearing and rejected the suggestion of rehearing en banc. (Appendix F).

REASONS FOR GRANTING THE PETITION

There are three reasons for this Court to exercise its supervisory power to review the decision and orders of the Ninth Circuit Court. First, the appellate court's error is of constitutional magnitude. If it is unchecked, double jeopardy is assured and the petitioners' Fifth Amendment rights will be violated.

Second, the Ninth Circuit's opinion directly conflicts with decisions of this Court as well as decisions of other Circuits on the preclusive effect of a prior acquittal.

Third, the Ninth Circuit's opinion directly conflicts with this Court's rulings on the sufficiency of allegations of mail fraud in an indictment.

A. A Retrial Of Petitioners On Any Part Of The Indictment Will Violate The Double Jeopardy Provisions Of The Federal Constitution.

This case presents novel but compelling circumstances for the application of the Double Jeopardy protections provided by the Fifth Amendment of the United States Constitution.

It is indisputable that the mail fraud counts which the government now seeks to resurrect have three necessary elements: (1) participation in a scheme to defraud, (2) causing the mails to be used, (3) for the purpose of executing the scheme. U.S. v. Mitchell, 744 F.2d 701, 703 (9th Cir. 1984) (to charge a violation of mail fraud statute, indictment must allege the formation of a scheme to defraud and a knowing use of

the mails in furtherance of the scheme); United States v. Brutzman, 731 F.2d 1449 (9th Cir. 1984) (necessary elements of mail fraud are participation in a scheme or artifice to defraud, causing the use of the mails for the purpose of executing the scheme.)

It is similarly indisputable that the question of whether petitioners participated in the underlying scheme to defraud was squarely before the trial court. The statements and findings of the trial judge make this clear.

As to Count 1 (conspiracy), the Honorable Walter E. Craig stated in entering a judgment of acquittal: "the Court finds that the prosecution has failed to present evidence from which any rational trier of fact could conclude that the defendants or either of them, were parties to any agreement

or conspiracy to commit either mail fraud or wire fraud or fraud against the United States, nor could any rational trier of fact conclude beyond a reasonable doubt from the evidence presented that the defendants or either of them, had the intent to commit either mail fraud or wire fraud or fraud against the United States." (Appendix G, page 44).

As to the other counts, Judge Craig determined: "the Court finds that the prosecution has failed to present sufficient evidence to allow any rational trier of fact to conclude beyond a reasonable doubt that the defendants, or either of them, were participants in any scheme or artifice to defraud, or any scheme or artifice to obtain money or property by false or

fraudulent pretenses". (Appendix G, page 45).

To state the obvious, a trial on the mail fraud allegations in Counts 2 through 30 necessarily involves a trial on each essential element of mail fraud. This, in turn, means that the government would have a second attempt at establishing that McCarthy and Okahara participated in exactly the same scheme to defraud for which they were acquitted. This "second chance" would place the petitioners in jeopardy twice on exactly the same issue. The Fifth Amendment does not permit this result.

Further, 18 U.S.C. 3731 (under which the government brought its appeal) provides that appeals by the United States may be taken "except that no appeal shall lie where the double

jeopardy clause of the United States Constitution prohibits further prosecution." Here, the double jeopardy clause does apply and the Ninth Circuit therefore had no authority to entertain the government's arguments, much less reverse the trial court's findings.

B. Decisions of this Court and other Circuits; Estoppel.

As a threshold matter, there is no dispute that proof of an underlying scheme to defraud is a required element of an offense actionable under 18 U.S.C. 1341. United States v. Beecroft, 608 F.2d 753, 757 (9th Cir. 1979) (substantive offense of mail fraud requires proof of a scheme to defraud).

It is well established in this Court as well as in the various circuits that a final judgment on an essential element of the charged offense bars a subsequent trial involving the same element. Ashe v. Swenson, 397 U.S. 436, 443, 90 S.Ct. 1189, 1194, 25 L.Ed.2d 469 (1970) (when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated betwen the same parties in any future lawsuit.)

In United States v. Scott, 437 U.S. 82, 98 S.Ct. 2187, 57 L.Ed.2d 65 (1978), this Court reaffirmed its position in United States v. Martin Linen Supply Co., 430 U.S. 564, 97 S.Ct. 1349, 51 L.Ed.2d 642 (1977) that the pivotal task in double jeopardy cases is to "determine whether the ruling of the

judge, whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the case."

The United States Court of Appeals for the District of Columbia has recognized this general rule and its application to double jeopardy/estoppel cases. See Sedgwick v. Superior Court for the District of Columbia 584 F.2d 1044 (D.C. Cir. 1978). So has the Fifth Circuit (Carter v. Estelle, 677 F.2d 427 (5th Cir. 1982) (citing the above passage from Scott); the Eighth Circuit (United States v. Baugus, 761 F.2d 506, 508 (8th Cir. 1985), (collateral estoppel is part of the fifth amendment guarantee against double jeopardy and precludes a second prosecution if such prosecution would require relitigation of specific fact

issues which have already been judicially determined); the Tenth Circuit (United States v. Genser, 710 F.2d 1426 (10th Cir. 1983) (citing the above passage from Scott); and the Third Circuit (United States v. Maker, 751 F.2d 614, 623 (3d Cir. 1984) (to determine whether Scott allows an appeal, the appellate court must consider whether the district court resolved in the defendant's favor an essential element of the offense charged).

On this issue, United States v. Allen, 539 F.Supp. 296 (C.D. Ca., 1982) is very instructive. There, the defendant was acquitted of conspiracy to commit mail fraud and substantive offenses of mail fraud. The government then sought to try the defendant on a second indictment arising out of the

same facts and circumstances. The court held:

> Since proof of the conspiratorial agreement is synonymous with proof of the scheme to defraud, the government's failure at the first trial to link defendant Richard Allen to the conspiracy necessarily indicated a lack of proof on the substantive mail fraud counts as well and the court accordingly entered a judgment of acquittal as to all charges. Given that this case involves a single conspiracy, it follows that the new scheme to defraud is actually the conspiratorial agreement litigated at the previous trial. Thus, even with the conspiracy count of the second indictment dismissed, the government, in trying the new substantive counts, would be relitigating the existence of the conspiratorial agreement. However, since Richard Allen has been acquitted of participating in that agreement, or scheme, trying him on the new substantive counts would permit relitigation of a fact already found in his favor. (539 F. Supp. at 308, 309) (citations ommitted).

In the instant case, this Court does not have to draw the inference (as the court did in Allen) that the "scheme

to defraud" alleged in the second trial is substantially similar to that alleged in the first proceeding. Here, the scheme to defraud is ver batim identical. The original indictment was merely cut into two "parts" prior to trial --- Counts 1 and 31 - 74; and Counts 2 -30. The "part" of the indictment on which petitioners were tried described exactly the same scheme to defraud as alleged in Counts 2 through 30.

The Ninth Circuit's decision is thus an anomaly which contradicts well-established precedent from this Court as well as decisions entered by the various circuit courts of appeal. Under these circumstances, review by certiorari is warranted.

C. Sufficiency of the indictment.

In addition to the foregoing, the Ninth Circuit's opinion conflicts with this Court's rulings in Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960). In Parr, this Court reversed a mail fraud conviction on the ground that mailings caused to be made under a duty imposed by law are not criminal under 18 U.S.C. 1341.

In the instant case, the indictment alleged in Counts 2 through 30 that the defendants caused pre-addressed envelopes to be mailed to mortgagors. The homeowners would then place their monthly mortgage checks in the envlopes to be sent to the mortgage servicing company --- which was under a pre-existing contract to collect and process the payments. It is not disputed that the envelopes were addressed correctly,

contained no "representations" other than the address, and were otherwise not "misleading".

The gravamen of the indictment was that mortgage payments went into a hopper and the defendants looted that hopper. There was no allegation that the mortgage payments would not have been made but for the mailing of the envelopes. Under Parr, this was not enough. The mailings must be part of the execution of the alleged fraud and must be an essential part of the scheme. Pereira v. United States, 347 U.S. 1, 8, 74 S.Ct. 358, 363, 98 L.Ed.2d 435 (1954). After reviewing the indictment in the light most favorable to the government, the trial court ruled that mailings in Counts 2 through 30 were not sufficiently closely related to the fraudulent scheme.

In any event, the petitioners have since been acquitted of any participation in the underlying scheme to defraud. Even if the mailings were "sufficiently closely related" to the fraudulent scheme, the mailings would still be moot ---- at least with respect to McCarthy and Okahara.

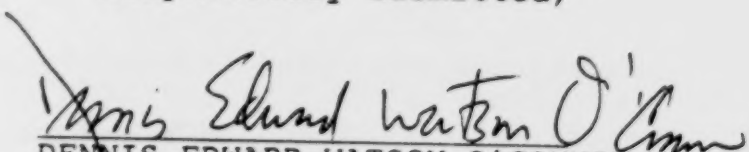
CONCLUSION

The opinion of the Ninth Circuit is contrary to the controlling decisions of this Court and is in direct conflict with precedent from every other circuit court of appeals.

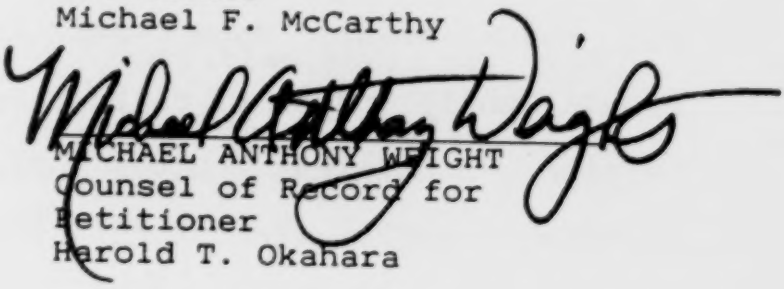
Moreover, if this Court does not exercise its power of supervision, double jeopardy is assured and petitioners' constitutional rights will be violated. McCarthy and Okahara

therefore request that a writ of certiorari issue.

Respectfully submitted,



DENNIS EDWARD WATSON O'CONNOR
JERROLD K. GUBEN
CHARLES EDWARD MCKAY
Counsel of Record for
Petitioner
Michael F. McCarthy



MICHAEL ANTHONY WRIGHT
Counsel of Record for
Petitioner
Harold T. Okahara

Certificate of Service

I hereby certify that on this 12th day of August, 1988, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Daniel Bent, United States District Courthouse, 300 Ala Moana Blvd., Room C-242, Honolulu, Hawaii 96813; John F. De Pue, Appellate Section, Criminal Div., Dept. of Justice, Washington D.C. 20530. I further certify that all parties required to be served have been served.

Michael Anthony Wright

Michael Anthony Wright

BEST AVAILABLE COPY

UNITED STATES of America
Plaintiff-Appellant,

v.

Curtis J. BERNHARDT, Michael F. McCarthy, Harold T. Okahara, Jr., and Carl J. Bernhardt, Defendants-Appellees.

No. 85-1250.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 14, 1986.

Decided Feb. 25, 1988.

Daniel Bent, U.S. Atty., and Frank A. Wilson, Asst. U.S. Atty., Honolulu, Hawaii, John F. De Pue, Crim. Div., Washington, D.C., for plaintiff-appellant.

Benjamin B. Cassiday, III, Asst. Federal Public Defender, Honolulu, Hawaii, for defendant-appellee Carl J. Bernhardt.

Peter A. Donohoe, Honolulu, Hawaii, for defendant-appellee Curtis J. Bernhardt.

Dennis E.W. O'Connor and Charles E. McKay, Hoddick, Reinwald, O'Connor & Marrack, Honolulu, Hawaii, for defendant-appellee McCarthy.

Michael E. Weight, Honolulu, Hawaii, for defendant-appellee Okahara.

Appeal from the United States District Court for the District of Hawaii.

Before SNEED, ANDERSON and POOLE, Circuit Judges.

POOLE, Circuit Judge:

The United States appeals the district court's dismissal of twenty-nine counts of a seventy-four-count indictment. The subject counts charged defendants Curtis Bernhardt, Carl Bernhardt, Michael McCarthy, Harold

Okahara (collectively appellees), and Daniel Matsukage with conspiracy to violate the mail fraud and wire fraud statutes of the United States, 18 U.S.C. 371, 1341, 1343 and 2. Sixty-five separate acts of mail fraud (Counts 2 through 66) and eight acts of wire fraud (Counts 67 through 74) were set forth. Upon the motion of the defendants and following the recommendation of a United States Magistrate, the district court dismissed certain of the mail fraud counts, holding, on the authority of Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), that the mailings could not be held to have been made for the purpose of executing the alleged fraudulent scheme because they were normal business usages. We reverse and remand.

FACTS AND PROCEEDINGS

Daniel Matsukage was president of both Pacific Standard investment and Loan, Inc. (Pacific) and Real Estate Finance Corporation (REFC). Pacific is an industrial loan company authorized by Hawaii state law to solicit public funds for deposit and to make loans with these funds. REFC is a mortgage servicing company which has agreements with various mortgage companies to collect monthly mortgage payments from homeowners, deposit the payments into trustee accounts, and forward the balance of the monthly principal and interest to the mortgage companies after paying property taxes and other expense incurred on the serviced property.

Appellees were officials of Norfolk Investment Co., Limited (Norfolk).

Norfolk was established for the purpose of generating profits from investments in real estate and various other ventures.

By a superseding grand jury indictment, the government alleged that between December 1977 and December 1981, appellees and Matsukage operated these companies so as to carry out a broad scheme to defraud. Briefly, the scheme was said to have been as follows: Appellees and Matsukage organized and implemented depositor solicitation programs to attract depositors for Pacific. It was charged that they diverted funds from these programs into loans and disbursements to themselves as well as to REFC, Norfolk, and Norfolk's subsidiaries. To induce investments in Pacific, they artificially increased Pacific's capital stock, thereby

receiving large deposits which they used to pay off loans owed Pacific, creating the appearance that Pacific had a more favorable cash position than actually existed. In addition, they caused security and collateral for loans made by Pacific to be released, subordinated, and substituted for their own benefit. It was further charged that appellees and Matsukage covered up these activities by causing false entries to be made and published by Pacific concerning its financial status.

To provide Pacific and Norfolk with additional cash, appellees and Matsukage were alleged to have diverted funds collected by REFC from homeowners pursuant to the mortgage servicing contracts. Instead of forwarding the proceeds to the mortgage companies or applying them to satisfy property tax

7bills, defendants would use the money as operating cash to improve Pacific's deficit cash position, or they would divert the funds to Norfolk to support its various business enterprises. To conceal their scheme with respect to REFC, they were alleged to have made or caused to be made false entries, records, representations and omissions of material facts.

Count 1 of the superseding indictment charged appellees and Matsukage with conspiracy to commit mail and wire fraud in violation of 18 U.S.C. 371. Counts 2 through 30 charged separate acts of mail fraud, alleging that appellees and Matsukage caused the homeowners to mail their mortgage payments to REFC by sending the homeowners pre-addressed envelopes. Counts 31 through 65 alleged other mail

fraud violations, while counts 66 through 74 alleged separate criminal acts of wire fraud.

Following a magistrate's recommendation and report, the district court dismissed counts 2 through 30 charging mail fraud. These counts were severed to allow this appeal by the government.

Meanwhile, McCarthy and Okahara proceeded to jury trial on the conspiracy count and on the mail fraud and wire fraud counts that had not been dismissed (Counts 1 and 31 through 74). At the conclusion of the government's case in chief, McCarthy and Okahara moved for a judgment of acquittal. The district court granted their motion as to all counts on the grounds of insufficiency of evidence. The government appealed the judgment of

acquittal, but later moved to dismiss, recognizing that that appeal was barred by the Double Jeopardy Clause. By order of April 18, 1986 we granted the government's motion to dismiss that appeal.

In June 1986, the Bernhardts moved in district court to dismiss the counts surviving against them (other than those involved in this appeal). They claimed that since there had been a prior prosecution in Hawaii state court based largely upon the identical transactions set forth in the indictment and it had been dismissed by the state court because barred by the statute of limitations, further trial was barred by the Double Jeopardy Clause because the state and federal prosecutions were the same. They also claimed vindictive prosecution and collateral estoppel

arising from the acquittal of Okahara and McCarthy. The district court denied motions to dismiss based on collateral estoppel and vindictive prosecution, but granted the motion for double jeopardy indicating that it believed the two prosecutions were in effect the same. The government appealed the judgment granting dismissal on double jeopardy grounds. We reversed and remanded to permit the district court to make the factual determination essential to the applicability of Bartkus v. Illinois, 359 U.S. 121, 79 S.Ct. 676, 3 L.Ed.2d 684 (1959). United States v. Curtis J. Bernhardt, et al., 831 F.2d 181, 183 (9th Cir. 1987). The Bernhardts' attempted appeals of the denials of their vindictive prosecution and collateral estoppel claims were dismissed as nonappealable prior to

trial. United States v. Curtis J. Bernhardt, et al., Nos. 86-1200 and 86-1201 (9th Cir. October 27, 1987) (unpublished) [831 F.2d 303 (table)].

This appeal involves the propriety and effect of the dismissal of Counts 2 through 30, and whether Curtis Bernhardt and Carl Bernhardt may yet be tried. Defendant Matsukage is deceased.

DISCUSSION

A. Reviewability

Pursuant to 28 U.S.C. 636(b)(1)(B), the district court designated a magistrate to conduct hearings and to submit to the court proposed findings of fact and recommendations for defendants' motions to dismiss the above-numbered counts of

the indictment.1 Any party may serve and file written objections as provided by rules of court within 10 days of service of the magistrate's report and recommendations. The district court must make a de novo review of those portions to which objection is made. Id. The Rules of the United States District Court for the District of Hawaii mirror the statute and provide that the district court may consider the record developed before the magistrate

---

1. Section 636(b)(1)(B) provides in part:

> a judge may * * * designate a magistrate to conduct hearings * * * and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A) * * *.

and need not conduct a new hearing unless required by law. Local Rule 404-2 of the United States District Court for the District of Hawaii.2 Appellees argue that the the government's failure to file written objections to the magistrate's report and recommendation within the ten days set forth in the statute and the local rules, caused waiver of its right to appeal the district court's decision adopting that recommendation.

[1] The failure to object to a magistrate's recommendation does not

---

2. Local Rule 404-2 provides that

> Any party may object to a magistrate's proposed order, findings, or recommendations * * * within 10 days after being served with a copy thereof. Such party shall file * * * written objections which shall specifically identify the portions of the proposed

(footnote continued on next page)

preclude appellate review under the statute. Britt v. Simi Valley Unified School District, 708 F.2d

---

2. continued
order, findings, or recommendations to which objection is made and the basis for such objections. Any party may respond to another party's objections within 10 days after being served with a copy thereof. A United States District Judge shall make a de novo determination of those portions of the report or specific proposed findings of recommendation to which dtermination is made and may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The United States District Judge, however, will not conduct a new hearing unless required by law, and may consider the record developed before the magistrate, making his own determination on the basis of that record. The United States District Judge may in his discretion receive further evidence, recall witnesses or recommit the matter to the magistrate with instructions.

Local Rule 404-2 of the Rules of the United States District Court for the District of Hawaii.

452, 454 (9th Cir. 1983). Furthermore, the local rule does not indicate that the failure to file objections in district court bars a subsequent appeal. Nevertheless, appellees ask this court to exercise its inherent supervisory powers and require a party seeking review of a magistrate's decision to file objections within ten days or waive the right to appeal. Although the Supreme Court has held that a court of appeals may exercise its supervisory powers to establish such awaiver rule, Thomas v. Arn, 474 U.S. 140, 142, 106 S.Ct. 466, 468, 88 L.Ed.2d 435 (1985), we have declined to adopt such a rule. Britt, 708 F.2d at 454. In Britt, we held that failure to file objections waives only factual issues on appeal. Id.; accord McCall v. Andrus, 628 F.2 1185, 1187, 1189 (9th Cir.

1980), cert. denied, 450 U.S. 996, 101 S.Ct. 1700, 68 L.Ed.2d 197 (1981). Because the issues in this case are purely legal, the government has not waived its right to challenge the magistrate's recommendations and the district court's order dismissing Counts 2 through 30.

B. Dismissal of Counts Two Through Thirty

The dismissed mail fraud counts concern the mailings of mortgage and tax payments by homeowners to REFC in pre-addressed envelopes.3 Appellees

---

3. Section 1341, the mail fraud statute, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, * * * for the purpose of

(footnote continued on next page)

allegedly misappropriated this money for use by Pacific and Norfolk. Relying upon Parr v. United States, 363 U.S. 370, 80 S.Ct. 1171, 4 L.Ed.2d 1277 (1960), the magistrate recommended and the trial court ordered dismissal of these counts because the mailings were not made "in furtherance" of the scheme to defraud but were sent regularly and routinely as required by pre-existing servicing contracts with REFC,

---

3. continued

> executing such scheme or artifice or attempting so to do * * * knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing [whatever to be sent or delivered by the Postal Service], shall be be fined not more than $1,000 or imprisoned not more than five years, or both.
>
> 18 U.S.C. 1341 (1982).

mortgagors and mortgage companies. The district court adopted the magistrate's report and dismissed counts 2 through 30.

[2] An indictment is sufficient to withstand a motion to dismiss if it contains the elements of the charged offense in sufficient detail (1) to enable the defendant to prepare his defense; (2) to ensure him that he is being prosecuted on the basis of facts presented to the grand jury; (3) to enable him to plead double jeopardy; and (4) to inform the court of the alleged facts so that it can determine the sufficiency of the charge. United States v. Jenkins, 785 F.2d 1387, 1392 (9th Cir.), cert. denied sub nom. Prock v. United States, --- U.S. ---, 107 S.Ct. 192, 93 L.Ed.2d 125 (1986), and sub nom. White v. United States, ---

U.S. ---, 107 S.Ct. 288, 93 L.Ed.2d 262 (1986). Whether an indictment is sufficient to withstand a motion to dismiss is a legal question which this court reviews de novo. United States v. Buckley, 689 F.2d 893, 897 (9th Cir. 1982), cert. denied, 460 U.S. 1086, 103 S.Ct. 1778, 76 L.Ed.2d 349 (1983); see United States v. McConney, 728 F.2d 1195 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). In making our analysis, we presume that the allegations of the indictment are true. Buckley, 689 F.2d at 897.

To charge a violation of 18 U.S.C. 1341 or 1343, an indictment must allege facts demonstrating (1) the formation of a scheme to defraud, and (2) a knowing use of the mails in furtherance of the scheme. United

States v. Mitchell, 744 F.2d 701, 703 (9th Cir. 1984). Under the statutes, the mailings must be made or caused to be made "for the purpose of executing such scheme." United States v. Maze, 414 U.S. 395, 400, 94 S.Ct. 645, 648, 38 L.Ed.2d 603 (1974). Relying on Parr, appellees argue that the indictment could not be held to allege that the mailings by the homeowners or the transmission by wire were made in furtherance of the scheme to defraud.

In Parr, the Supreme Court held that tax statements, checks in payment of taxes, and receipts of tax payments mailed or caused to be mailed by a local school board were not sent in furtherance of a scheme to defraud the school district of its revenue. The Court said:

> it cannot be said that mailings made or caused to be made under the imperative command of duty imposed by state law are criminal under the federal mail fraud statute, even though some of those who are so required to do the mailing for the District plan to steal, when or after received, some indefinite part of its moneys.

Parr, 363 U.S. at 391, 80 S.Ct. at 1183-84 (emphasis supplied). Appellees argue that here, as in Parr, there was a pre-existing legal obligation to collect the mortgage and tax payments of the homeowners by virtue of REFC's contracts with the mortgage companies.

[3] Appellees, however, endow Parr with too broad a scope. As noted by the Court, the factual situation in Parr was unique. Id. at 391, 80 S.Ct. at 1183. There, the Board was legally required by state law to assess, collect, and receipt taxes. This was, in fact, one of the Board's primary duties as a

public corporation organized under state law. See id. at 374, 80 S.Ct. at 1174. Thus, it was the command of the state that compelled the mailings in that case independently of any contracts. By contrast, the mailings at issue in this case were made to REFC pursuant to the inducement of private contracts initiated by appellees. No preexisting legal obligation, federal, state or local, required homeowners to transmit their monthly mortgage payments or property taxes through a mortgage servicing company such as REFC. Instead, the obligation to remit these payments to REFC arose from REFC's causation. The superseding indictment alleged that Matsukage, president of REFC and Pacific, and appellees, officials of Norfolk, actively engaged in a community of activities to foster

the business interests of REFC. Consequently, appellees along with Matsukage controlled that company and used their positions to defraud the other parties to the mortgage servicing contracts.

Appellees contend that such a distinction is not controlling; that the Court's holding in Parr was founded on the premise that the mailings would legally have occurred in complete absence of the scheme to defraud. See United States v. Tarnopol, 561 F.2d 466, 472 (3d Cir. 1977) ("We do not believe there is a valid distinction to be drawn between those routine mailings which are required by law and those routine mailings, themselves intrinsically innocent, which are regularly employed to carry out a necessary or convenient procedure of a legitimate business

enterprise."). But see United States v. Brown, 540 F.2d 364, 377 (8th Cir. 1976) (if the use of the mails is a business practice and not otherwise legally required, then the limited immunity defense recognized in Parr is inapplicable). Appellees argue that the homeowners' mailings in counts 2 through 30 would have occurred even if appellees had not devised and implemented the alleged scheme because of the pre-existing contracts between REFC and the mortgage companies. See Mitchell, supra, 744 F.2d at 704.

In Mitchell, the defendant, a member of the city council, had used his position to secure the council's approval of a condominium conversion project. In return for his support of the project, he received more than $100,000 from the project's owner.

Mitchell had used the mails to defraud the city and his council colleagues by concealing the project owner's interest and Mitchell's hidden profit from the project's approval. Mitchell, citing Parr, raised the defense against a prosecution for violating 18 U.S.C. 1341 that since the mailings concerning the condominium project were independently required by law to be sent out before the project could be approved, they were not "in furtherance" of the scheme to defraud. We, however, distinguished Parr by noting that the mailings in Parr were sent out regularly and routinely and would have been mailed even if the scheme to defraud the District had not existed. In contrast, it was the defendant's fraudulent scheme that triggered the applicability of the

local law that required the mailings in Mitchell. Id.

While our Mitchell decision held that Parr does not insulate from federal prosecution mailings whose necessity under law was triggered by the fraudulent scheme, it is not necessarily dispositive here. The issue here is whether mailings required by a Private agreement, wherein one of the parties to the agreement is seeking to defraud the other, can be said to have been sent in furtherance of the underlying scheme to defraud. Neither Parr nor Mitchell dealt with such a circumstance.

As previously stated, the homeowners' duty to make the payments to REFC stemmed from contracts between REFC and various mortgage companies. The government alleged that appellees and Matsukage exercised control over REFC.

As parties to these servicing contracts through their control of REFC, appellees retained the power to control REFC's legal obligations under the contracts and hence the payments by homeowners to REFC. Accordingly, the facts of this case depart from those of Parr; here, the requirement for the mailings stemmed from private convenience rather than from an independent and unrelated obligation, namely state law.

That appellees "caused" the mails to be used by the homeowners is beyond dispute. A person "causes" the mails to be used under 1341 where he "does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen even though not actually intended . . .." Pereira v. United States, 347 U.S. 1, 8-9, 74 S.Ct.

358, 363, 98 L.Ed. 435 (1954). Indeed, the Supreme Court's holding that mailings "in the ordinary course of business" are within the contemplation of section 1341 is clear support for the proposition that the exception created in Parr is narrow and that the general rule is that ordinary mailings are within the statute. Here, the homeowners were sent pre-addressed envelopes by which to remit their monthly payments. Obviously, appellees could not only foresee, but they also actually intended the homeowners to use the mails to remit such payments.

Because appellees caused the mailings in counts 2 through 30 for the purpose of executing the fraudulent scheme as alleged in the indictment, the district court erred in dismissing those

counts under presumed compulsion of the decision in United States v. Parr.

C. Application of Collateral Estoppel

[4] As set forth above, at the conclusion of their jury trial, McCarthy and Okahara moved for judgments of acquittal on the conspiracy count and on the remaining undismissed mail and wire fraud count. The district court granted the motion from the bench. Accordingly, under the Double Jeopardy Clause of the Fifth Amendment McCarthy and Okahara cannot be retried on the counts of which they were acquitted. It is immaterial whether the acquittal was by jury verdict or by a direction of the court, either after the prosecution has completed its case or after all evidence is in. In any case, where there is an acquittal or direction to the jury to

acquit, further trial on those charges is barred. United States v. Scott, 437 U.S. 82, 91, 98 S.Ct. 2187, 2193, 57 L.Ed.2d 65 (1978). The Bernhardts, however, argue that the acquittal of McCarthy and Okahara is a bar to putting them to further trial as to Counts 2 through 30. They urge us to apply nonmutual collateral estoppel against the government, We do not agree.

[5] We not initially that the Double Jeopardy Clause does not bar the trial of any of the defendants as to Counts 2 through 30 "for the obvious reason that the subject counts . . . were dismissed prior to trial, and, therefore, the defendants have not yet been placed in jeopardy." United States v. Schwartz, 785 F.2d 673, 681 (9th Cir.:), cert. denied,--U.S.--, 107 S.Ct. 290, 93 L.Ed.2d 264 (1986). As to all

appellees, however, we must analyze whether their trial is barred by the collateral estoppel doctrine.

[6] The Fifth Amendment guarantee against double jeopardy encompasses the doctrine of collateral estoppel. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970). This circuit employs a three-step process in analyzing a collateral estoppel claim. Schwartz, 785 F.2d at 681; United States v. Hernandez, 572 F.2d 218, 220 (9th Cir. 1978). First, we identify the issues in the two actions to determine whether they are sufficiently similar and material to justify invoking the doctrine. Next, the record of the prior case must be examined to decide whether there was a full and fair opportunity to litigate the issue. Finally, we must decide, based on our examination of the

record, whether the issue was necessarily decided in the prior case.

Applying the first factor, it is undeniable that the factual issues underlying count 1 and counts 31 through 66 are substantially similar to those posed by counts 2 through 30. The misappropriation of the mortgage payments mailed in by the homeowners was part of the overall scheme to defraud, as it was a source of cash to help fund the fraudulent activities of the defendants and the companies they controlled. We conclude that in the McCarthy and Okahara trial the government litigated the conspiracy charge, that part of Count 2 which set up the predicate scheme for Counts 30 through 39 (mailings by REFC to mortgage companies), Counts 45 through 48 (announcing REFC's intent to sell its

mortgage servicing portfolio), and Counts 49 through 66 (mailing monthly balances). Those counts were structually similar to the dismissed counts, albeit they argued different transactions and different times. The structure of the indictment was such that any of the counts, particularly the mail fraud counts, were bound up in a common nucleus related to the conspiracy and to the existence of the triggering scheme. Indeed, in order to present the mail fraud counts, the government had to advert to Counts 1 and 2, and in fact did so. Under these circumstances, we believe that the government had an opportunity fully to litigate as against McCarthy and Okahara that portion of the scheme which involved the obtaining of misapplication of the mortgage funds collected by REFC.

The last factor--whether the common issue involved in counts 2 through 30 and the remaining counts was necessarily decided against the government--is not so clear. In order for collateral estoppel to apply an ultimate fact must have been determined previously by a valid and final judgment if relitigation of that issue between the same parties in a future lawsuit is to be foreclosed. Ashe, 397 U.S. at 443, 90 S.Ct. at 1194. The circumstances of this case are unlike those normally present when a defendant seeks to invoke collateral estoppel to preclude a subsequent prosecution. Generally, the doctrine of collateral estoppel is invoked after the factfinder has returned a verdict of not guilty in the prior prosecution. Here, the trial of McCarthy and Okahara ended before the

case was submitted to the jury pursuant to Rule 29 of the Federal Rules of Criminal Procedure.

The district court's function is reviewing a defendant's motion for acquittal is quite narrow. The court, after viewing the evidence in the light most favorably to the government, must determine whether the jury could reasonably find the defendant guilty beyond a reasonable doubt. United States. v. Merriweather, 777 F.2d 503, 507 (9th Cir. 1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1497, 89 L.Ed.2d 898 (1986). The district court, however, must bear in mind that it is the jury's exclusive function to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts. United States v. Dreitzler, 577

F.2d 539, 545 (9th Cir. 1978), cert. denied, 440 U.S. 921, 99 S.Ct. 1246, 59 L.Ed.2d 473 (1979).

Although in granting such a motion the district court is not sitting as the trier of fact, its finding of insufficient proof of a factual element of the crime apparently may be sufficient to trigger application of collateral estoppel. See Sanabria v. United States, 437 U.S. 54, 72-73, 98 S.Ct. 2170, 2183, 57 L.Ed.2d 43 (1978) (district court's acquittal for insufficient proof of an element of the crime which was common to the second charge was treated as a "finding of fact" which stood as an absolute bar to further litigation of th at element).

Addressing the conspiracy charge, the court concluded that the evidence was insufficient to show "any agreement

or conspiracy to commit either mail fraud or wire fraud or fraud against the United States, nor . . . that the defendants, or either of them, had the intent to commit either mail fraud or wire fraud or fraud against the United States." With respect to the remaining counts, the court found that the evidence was insufficient "that the defendants, or either of them, were participants in any scheme or artifice to obtain money or property by false or fraudulent pretenses alleged in the superseding indictment." The court also found that no rational trier of fact would conclude beyond a reasonable doubt from all the evidence presented that the alleged uses of the mails were made for the purpose of executing any scheme or artifice to defraud.

These conclusions by the district court obviously are quite sweeping and highly generalized. In granting the motion, the court did not explain its reasoning or give any hint as to the weaknesses or deficiencies in the government's case. In fact, the record is devoid of any critical analysis whatsoever by the district court. Consequently, we are left to speculate about the reasons for the acquittal. Because we are mindful of the limitations upon the trial court's grant of a Rule 29 motion for a judgment of acquittal, we would hesitate to invoke collateral estoppel on such a shaky foundation.

The decision in Ashe v. Swenson, has some pertinence here and Justice Stewart's treatment of that unique case is significant. In Ashe,

three or four masked men broke into a house where six persons were engaged in playing poker. They robbed each player of money and property. They--whether three or four is uncertain--fled in the car of one of the victims. The car was found in a field and three men were arrested walking on a highway near the car. Ashe was arrested some distance away. All four were charged with robbery and theft of the car a single indictment. Ashe went to trial alone charged with robbing victim Knight. The identity was weak and Ashe was acquitted. Six weeks later Ashe was brought to a second trial for the robbery of victim Roberts. Ashe moved to dismiss based on his prior acquittal. The motion was denied. The testimony of the witnesses stronger

on identity. The jury found Ashe guilty.

After exhausting appeal and remedy be habeas, Ashe petitioned for and the Supreme Court granted certiorari. Justice Stewart addressed the term "collateral estoppel" as follows:

> "Collateral estoppel" is an awkward phrase, but it stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law at least since this Court's decision more than 50 years ago in United States v. Oppenheimer, 242 U.S. 85 [37 S.Ct. 68, 61 L.Ed 161 (1916)]. As Mr. Justice Holmes put the matter in that case, "It cannot be that the safeguards of the person, so often and so rightly mentioned with solemn reverence, are less than those that protect from a liability in debt." 242 U.S. at 87 [37 S.Ct. at 69]. As a rule of federal law, therefore, "[i]t is much too late to suggest that this principle is

> not fully applicable to a former judgment in a criminal case, either because of lack of 'mutuality' or because the judgment may reflect only a belief that the Government had not met the higher burden of proof exacted in such cases for the Government's evidence as a whole although not necessarily as to every link in the chain." United States v. Kramer, 289 F.2d 909, 913 [(2d Cir. 1961)].

Ashe 397 U.S. at 443, 90 S.Ct. at 1194 (internal footnote omitted).

The nub of the decision in Ashe's favor was this: "The single rationally conceivable issue in dispute before the jury was whether the petitioner had been one of the robbers. The jury by its verdict said that he had not. The Federal Rules of Law, therefore, would make a second prosecution for the robbery of Roberts wholly impermissible." Ashe at 445, 90 S.Ct. at 1195.

The above rationale does not fit neatly the situation involving McCarthy

and Okahara. That the government failed to prove that they conspired (count 1) or that they hatched the scheme charged against them in counts other than 2 through 30, does not imply by analogy to Ashe, that it was therefore not "rationally conceivable" that they committed the offenses in the discrete counts of 2 through 30. The government may or may not succeed in convincing the court or jury of their guilt at a trial. What we determine here is that the verdict which Judge Craig directed in their favor as to the other charges does not collaterally es top further trial on the issues which were not encompassed in that verdict.

[7] Turning now to whether the Bernhardts, who have not gone to trial because of the acquittal of McCarthy and Okahara, we are of the opinion that such

trial is in no way barred. Judge Craig did not have before him the severed counts (2 through 30) when he made his ruling. The finding that the evidence against McCarthy and Okahara was insufficient for a rational jury to have found that they were involved in conspiracy, scheme to defraud, with the requisite intent, does not render it "rationally [in]conceivable" that the Bernhardts could have been so involved. Indeed, the Bernhardts' situation is more like that in Standefer v. United States, 447 U.S. 10, 100 S.Ct. 1999, 64 L.Ed.2d 689 (1980) than that in Ashe.

Standefer, a corporate official, was indicted for his part in paying for the vacations of Niederberger, an official of the Internal Revenue Service. The indictment contained nine counts, four of which alleged illegal

gifts to Niederberger in violation of 18 U.S.C. 201(f) and five of which charged abiding and abetting the official in receiving unauthorized compensation, in violation of 18 U.S.C. 2, which took the form of paying for five vacation trips by Niederberger to Pompano Beach, Miami, Absecon, Pebble Beach and Las Vegas.

Niederberger was himself separately charged in a ten-count indictment with five counts of violating 18 U.S.C. 201(g), and five counts of violating 26 U.S.C. 7214(a)(2), which forbid the acceptance of unauthorized compensation. Niederberger was convicted after trial of four counts under 18 U.S.C. 201(g) (vacations in Miami, Absecon, Pebble Beach, and Las Vegas). He was acquitted on one 201(g) count (Pompano Beach, apparently

because the statute of limitations had run), and on three 7214(a)(2) counts (Pompano Beach, Miami, and Absecon).

After Niederberger's trial, but before start of his own, Standefer moved to dismiss the counts which charged him with aiding and abetting Neiderberger in connection with the Pompano Beach, Miami and Absecon vacations, arguing that since the sole principal had been acquitted of accepting unlawful compensation as to those trips, he could not be convicted of aiding and abetting the commission of those offenses. The district court denied the motion. Standefer admitted authorizing payments for all five trips, but claimed they were on a personal basis and not designed to influence Niederberger. The jury convicted him of all nine counts. The Court of Appeals

affirmed the conviction. The Supreme Court granted certiorari because it involved an issue "of importance to the administration of criminal justice on which the Courts of Appeals are in conflict." 447 U.S. at 14, 100 S.Ct at 2003.

In the Supreme Court, Standefer had two arguments. The first was that one charged as an aider and abettor could not be prosecuted after the principal has been acquitted of the offense charged. The second was that the government was at least barred from relitigating the issue whether Niederberger had accepted unlawful compensation in connection with the Pompano Beach, Miami, and Absecon vacations because of the doctrine of nonmutual collateral estoppel. Chief Justice Burger, writing for a unanimous

court, rejected both contentions. It is with the second argument that we are primarily concerned.

The opinion first notes:

> The doctrine of nonmutual collateral estoppel was known to the common law and to the Congress when it enacted 2 in 1909. It emerged in a civil case in 1942, Bernhard v. Bank of America Nat. Trust & Savings Assn., 19 Cal.2d 807, 122 P.2d 892 [(1942)]. This Court first applied the doctrine in Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313 [91 S.Ct. 1434, 28 L.Ed.2d 788] (1971). There, we held that a determination of patent invalidity in a prior infringement action was entitled to preclusive effect against the patentee in subsequent litigation against a different defendant. Just this past Term we again applied the doctrine--this time "offensively"--to hold that a defendant who had had a "full and fair" opportunity to litigate issues of fact in a civil proceeding initiated by the Securities and Exchange Commission could be estopped from relitigating those issues in a subsequent action brought by a private plaintiff. Parklane Hosiery Co. v. Shore, 439 U.S. 322 [99 S.Ct. 645, 58 L.Ed.2d 552] (1979). In both cases, application of nonmutual estoppel promoted judicial economy and conserved private resources without unfairness to the litigant against whom estoppel was invoked.

Here, petitioner urges us to apply nonmutual estoppel against the Government; specifically he argues that the Government should be barred from relitigating Niederberger's guilt under 7214(a)(2) in connection with the vacation trips to Pompano Beach, Miami, and Absecon. That issue, he notes was an element of his offense which was determined adversely to the Government at Niederberger's trial.

This, however, is a criminal case, presenting considerations different from those in Blonder-Tongue or Parklane Hosiery. First, in a criminal case, the Government is often without the kind of "full and fair opportunity to litigate" that is a prerequisite of estoppel. Several aspects of our criminal law make this so; the prosecution's discovery rights in criminal cases are limited, both by rules of court and constitutional privileges; it is prohibited from being granted a directed verdict or from obtaining a judgment notwithstanding the verdict no matter how clear the evidence in support of guilt, cf. Fed.Rule Civ.Proc. 50; it cannot secure a new trial on the ground that an acquittal was plainly contrary to the weight of the evidence, cf. Fed.Rule Civ.Proc. 59; and it cannot secure appellate review where a defendant has been acquitted. See United States v. Ball, 163 U.S. 662, 671 [16 S.Ct. 1192, 1195, 41 L.Ed. 300] (1896).

The absence of these remedial procedures in criminal cases permits juries to acquit out of compassion or compromise or because of "'their assumption of a power which they had no right to exercise, but to which they were disposed through lenity.'" . . . It is of course true that verdicts induced by passion and prejudice are not unknown in civil suits. But in civil cases, post-trial motions and appellate review provide an aggrieved litigant a remedy; in a criminal case the Government has no similar avenue to correct errors. Under contemporary principles of collateral estoppel, this factor strongly militates against giving an acquittal preclusive effect. [Citation omitted.]

The application of nonmutual estoppel in criminal cases is also

complicated by the existence of rules of evidence and exclusion unique to our criminal law. It is frequently true in criminal cases that evidence inadmissible against one defendant is admissible against another. The exclusionary rule, for example, may bar the Government from introducing evidence against one defendant because that evidence was obtained in violation of his constitutional rights. And the suppression of that evidence may result in an acquittal. The same evidence, however, may be admissible against other parties to the crime "whose rights were [not] violated." Alderman v. United States, 394 U.S. 165, 171-72 [89 S.Ct. 961, 965, 22 L.Ed.2d 176] (1969). Accord, Rakas v. Illinois, U.S. 128, 134 [99 S.Ct. 421, 425, 58 L.Ed.2d 387] (1978). In such circumstances, where

evidentiary rules prevent the Government from presenting all its proof in the first case, application of nonmutual estoppel would be plainly unwarranted.

447 U.S. at 21-24, 100 S.Ct. at 2006-08. The Court concluded with the following statement:

> In denying preclusive effect to Niederberger's acquittal, we do not deviate from the sound teaching that "justice must satisfy the appearance of justice." Offutt v. United States, 348 U.S. 11, 14 [75 S.Ct. 11, 13, 99 L.Ed. 11] (1954). This case does no more than manifest the simple, if discomforting reality that different juries may reach different results under any criminal statute. That is one of the consequences we accept under our jury system." Roth v. United States, 354 U.S. 476, 492, n. 30 [77 S.Ct. 1304, 1313, n. 30, 1 L.Ed.2d 1498] (1957). While symmetry of results may be intellectually satisfying, it is not required. See Hamling v. United States, 418 U.S. 87, 101 [94 S.Ct. 2887, 2899, 41 L.Ed.2d 590] (1974).

Id. at 25, 100 S.Ct. at 2008-09.

The reasoning of Chief Justice Burger in Standefer demonstrates compellingly why the mere fact that a co-

defendant has been acquitted or convicted is not to be the determinant whether other persons not acquitted, indeed not even tried, may be subject to prosecution. But in this case, there is more: the findings of the trial judge in the cases of McCarthy and Okahara never purported to hold that there was no scheme as to counts 2 through 30, or that there were no mailings with fraudulent intent as to those counts. The government has never had a "full and fair" opportunity to litigate the issues of those counts as to any of the defendants. Thus, there is no obstacle to completion of this case.

CONCLUSION

The collateral estoppel doctrine does not bar the trial of appellees McCarthy and Okahara on the dismissed mail fraud counts. Accordingly, as to

these defendants, as well as to appellees Curtis Bernhardt and Carl Bernhardt, the pretrial dismissal of counts 2 through 30 of the superseding indictment is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 85-1250
Plaintiff-Appellant,	)	D.C. No. CR 85-00132-01-05
v.	)	ORDER
CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., and CARL J. BERNHARDT,	)	
Defendants-Appellees.	)	

Before: SNEED, ANDERSON, and POOLE, Circuit Judges

Pursuant to Ninth Circuit Rule 35-2, and within 15 days of this order, the United States Attorney is requested to respond in writing to the respective petitions for rehearing filed on March 10, 1988, by defendants-appellees Curtis J. Bernhardt and Carl J. Bernhardt and to

the petition for rehearing with suggestion for rehearing en banc filed on behalf of petitioners Michael F. McCarthy and Harold T. Okahara, in which the appellees Bernhardt have joined.

The Government's response shall not exceed 15 pages and should include discussion of the standing of petitioners McCarthy and Okahara to participate in this appeal.

No reply to the Government's response shall be filed unless the court shall hereafter permit.

The attention of the parties is directed to the two contemporaneous orders amending the slip sheet opinion.

C-1

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 85-1250
	)	
	)	D.C. No.
Plaintiff-Appellant,	)	CR 85-00132-01-05
	)	
	)	ORDER
v.	)	
	)	
CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., and CARL J. BERNHARDT,	)	
	)	
Defendants-Appellees.	)	
	)	
	)	

Before: SNEED, ANDERSON, and POOLE, Circuit Judges

The opinion of the court filed February 25, 1988 in the above case is amended at slip page 2304 by striking the first sentence of that page and substituting in its place the following language:

The government appealed the judgment granting dismissal on double jeopardy grounds. We reversed and remanded to permit the district court to make the factual determination essential to the applicability of Bartkus v. Illinois, 359 U.S. 121 (1959). United States v. Curtis J. Bernhardt, et al., No. 85-1250, 831 F.2d 181, 183 (9th Cir. 1987). The Bernhardts' attempted appeals of the denials of their vindictive prosecution and collateral estoppel claims were dismissed as non appealable prior to trial. United States v. Curtis J. Bernhardt, et al., Nos. 86-1200 and 86-1201 (9th Cir. October 27, 1987) (unpublished).

The opinion of the court is further amended at page 2321 of the slip opinion, concluding paragraph, by striking that paragraph in its entirety and substituting the following language:

CONCLUSION

Neither the decision of the Supreme Court in Parr v. United States, 363 U.S. 370 (1960), nor the collateral estoppel doctrine constitutes a bar to the trial of appellees Curtis J. Bernhardt and Carl J. Bernhardt on the dismissed mail fraud counts. Accordingly, the judgment dismissing counts two through 30 of the superseding indictment is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., and CARL J. BERNHARDT, Defendants-Appellees.	No. 85-1250 D.C. No. CR 85-00132-01-05 ORDER

Before: SNEED, ANDERSON, and POOLE, Circuit Judges

The order of the court filed March 30, 1988 requesting the United States Attorney to respond to the petitions for rehearing filed by appellees Curtis J. Bernhardt and Carl J. Bernhardt and to the suggestion for rehearing en banc filed on behalf of appellees Michael F.

McCarthy and Harold T. Okahara, in which appellees Bernhardt have joined, is amended by striking in their entirety the second, third and fourth paragraphs, and by substituting in place thereof the following:

> The Government's response shall be due within 15 days of this amended order and shall not exceed 15 pages. No reply to the Government's response shall be filed unless the court shall expressly permit.
>
> The purpose of this amended order is to clarify that Messrs. McCarthy and Okahara were and remain appellees of record herein; that there is no issue as to their standing to petition for rehearing with suggestion for rehearing en banc; and that the remand ordered does apply to them. See order filed April 8, 1988

which amends concluding paragraph at slip op. 4036.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., and CARL J. BERNHARDT, Defendants-Appellees.	No. 85-1250 D.C. No. CR 85-00132-01-05 ORDER

Before: SNEED, ANDERSON, and POOLE, Circuit Judges

The opinion of the court as amended on April 5, 1988, beginning at slip op. 4016 is further amended at slip op. 4036 by striking the paragraph under "Conclusion" and substituting in its place:first sentence of that page and substituting in its place:

Neither the decision of the Supreme Court in Parr v. United States, 363 U.S. 370 (1960), nor the collateral estoppel doctrine constitutes a bar to the trial of appellees Curtis J. Bernhardt, Carl J. Bernhardt, Michael F. McCarthy and Harold T. Okahara on the dismissed mail fraud counts, numbers two through 30. Accordingly, the judgment dismissing counts two through 30 of the superseding indictment is REVERSED as to all the above appellees and the case is REMANDED for further proceedings consistent with this opinion.

REVERSED and REMANDED.

The opinion of the court is further amended at page 2321 of the slip opinion, concluding paragraph, by striking that paragraph in its entirety and substituting the following language:

CONCLUSION

Neither the decision of the Supreme Court in Parr v. United States, 363 U.S. 370 (1960), nor the collateral estoppel doctrine constitutes a bar to the trial of appellees Curtis J. Bernhardt and Carl J. Bernhardt on the dismissed mail fraud counts. Accordingly, the judgment dismissing counts two through 30 of the superseding indictment is REVERSED and the case is REMANDED for further proceedings consistent with this opinion.

REVERSED and REMANDED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 85-1250
Plaintiff-Appellant,	)	D.C. No. CR 85-00132-01-05
v.	)	ORDER
CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., and CARL J. BERNHARDT,	)	
Defendants-Appellees.	)	

Before: SNEED and POOLE, Circuit Judges.

The panel as constituted above[1] has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

---

[1] The late Judge Anderson did not participate in the consideration or disposition of the petition.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CR.NO.85-00132
	)	
MICHAEL F. McCARTHY and HAROLD T. OKAHARA, JR.,	)	September 30, 1985
	)	Honolulu,
Defendants.	)	Hawaii
	)	

JUDGMENT OF ACQUITAL ARGUMENTS

BEFORE THE HONORABLE WALTER E. CRAIG, Judge.

[Transcript pages 43 through 48.]

fails in that respect.

And on that basis, your Honor, we submit on the strength of the memorandum we submitted to your Honor last week.

Thank you.

THE COURT: As you all know, Rule 29 of the Rules of Criminal Procedure provides in pertinent part:

The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquital of one or more offenses charged in the indictment or information after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses.

This Court has received and considered the defendants' motion for judgment of acquital and the government's response thereto and the accompanying

exhibits, and has reviewed both the evidence presented during the trial and the law applicable to this action. Having done so and having now heard oral arguments on defendants' motion, the Court concludes as follows:

The standard for determining whether a motion for judgment of acquital should be granted appears to be whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt.

In this case the crime charged in Count 1 of the superseding indictment is a conspiracy charge pursuant to Tile 18, United States Code, Section 371.

In order to survive a motion for judgment of acquital with respect to the crime charged in Count 1, the prosecution must have presented evidence

from which any rational trier of fact would conclude beyond a reasonable doubt, first, that there was an agreement to commit mail fraud or wire fraud or some other fraud against the United States. Secondly, that the defendants were parties to such agreement. Third, that one or more overt acts were committed in furtherance of such agreement. Fourth, that the defendants had the intent to commit mail fraud or wire fraud or fraud against the Untied States.

After reviewing the evidence in the light most favorable to the prosecution, the Court finds that the prosecution has failed to present evidence from which any rational trier of fact could conclude beyond a reasonable doubt that the defendants, or either of them, were parties to any agreement or conspiracy to commit either mail fraud or

wire fraud or fraud against the United States, nor could any rational trier of fact conclude beyond a reasonable doubt from the evidence presented that the defendants, or either of them, had the intent to commit either mail fraud or wire fraud or fraud against the United States.

Therefore, after reviewing all the evidence in the light most favorable to the prosecution, this Court concludes that the defendants' motion for judgment of acquitable as to Count 1 of the superseding indictment should be granted.

With respect to the remaining counts of the superseding indictment, the Court finds that the prosecution has failed to present sufficient evidence to allow any rational trier of fact to conclude beyond a reasonable doubt that

from which any rational trier of fact would conclude beyond a reasonable doubt, first, that there was an agreement to commit mail fraud or wire fraud or some other fraud against the United States. Secondly, that the defendants were parties to such agreement. Third, that one or more overt acts were committed in furtherance of such agreement. Fourth, that the defendants had the intent to commit mail fraud or wire fraud or fraud against the Untied States.

After reviewing the evidence in the light most favorable to the prosecution, the Court finds that the prosecution has failed to present evidence from which any rational trier of fact could conclude beyond a reasonable doubt that the defendants, or either of them, were parties to any agreement or conspiracy to commit either mail fraud or

wire fraud or fraud against the United States, nor could any rational trier of fact conclude beyond a reasonable doubt from the evidence presented that the defendants, or either of them, had the intent to commit either mail fraud or wire fraud or fraud against the United States.

Therefore, after reviewing all the evidence in the light most favorable to the prosecution, this Court concludes that the defendants' motion for judgment of acquitable as to Count 1 of the superseding indictment should be granted.

With respect to the remaining counts of the superseding indictment, the Court finds that the prosecution has failed to present sufficient evidence to allow any rational trier of fact to conclude beyond a reasonable doubt that

the defendants, or either of them, were participants in any scheme or artifice to defraud, or any scheme or artifice to obtain money or property by false or fraudulent pretenses alleged in the superseding indictment.

Furthermore, although the prosecution has presented evidence that defendants caused certain uses of the mails, viewing all the evidence int he light most favorable to the prosecution, no rational trier of fact would conclude beyond a reasonable doubt that such uses of the mails were made for the purpose of executing any scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses.

The prosecution has also failed to present sufficient evidence to allow any rational trier of fact to conclude beyond a reasonable doubt that the

defendants, or either of them, participated in or caused any wire transfer for the purpose of executing any scheme or artifice to defraud or to obtain money or property by means of false or fraudulent pretenses.

In reviewing all the evidence in the light most favorable to the prosecution, this Court concludes that defendants' motion for judgment of acquital as to Counts 31 through 74 of the superseding indictment should be granted.

Wherefore it is ordered, adjudged, and decreed that the defendants, and each of them, are not guilty as charged in Count 1 of the superseding indictment, and it is further ordered, adjudged, and decreed that the defendants, and each of them, are not

guilty as charged in Counts 31 through 74 of the superseding indictment.

And it is further ordered, adjudged, and decreed that the defendants, and each of them, are not guilty of a violation of Title 18, United States Code, Section2, aiding and abetting.

Call the jury.

MR. WILSON: Your Honor, with all due respect to the Court, I believe the Court has in its mind now to discharge the jury. We would ask the Court to send the jury home but not discharge them, pending our call to the Solicitor General's office to see if it will let us, the Solicitor General will let us take an interlocutory appeal from the Judge's order.

THE COURT: You can do that any time you want to.

MR. WILSON: I understand that, sir. But there are some consequences of the Court discharging the jury. We would ask the Court not to discharge the jury but to send them home until --

MR. O'CONNOR: (Interposing) Your Honor, we object to that. I think the jury should be discharged and the case should be ended.

THE COURT: I do too.

Call the jury.

Your request is denied.

(Proceedings in the presence of the jury:)

THE COURT: The record may show the presence of the jury, the presence of the defendants and their counsel, and the presence of the United States Attorney.

Ladies and gentlemen, the Rules of Criminal Procedure, and particularly

Rule 29, in pertinent part provide as follows:

The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquital of one or more offenses charged int he indictment or information after the evidence on either side is closed, if the evidence is insufficient to sustain a conviction of such offense or offenses.

The government having rested its case in this matter and the Court having received from the defendants a motion for judgment of acquital has granted that motion.

Therefore you are relieved of any responsibility, further responsibility.

I want to thank you all for your careful attention throughout the course of this lengthy trial. I now it

was boring sometimes, but it's interesting to dwell on the fact that the government of the United States calls on its citizens to devote their time in only two instances; one is in the armed services in times of national emergency, and the other is to serve on a jury. So it's interesting to note those two factors.

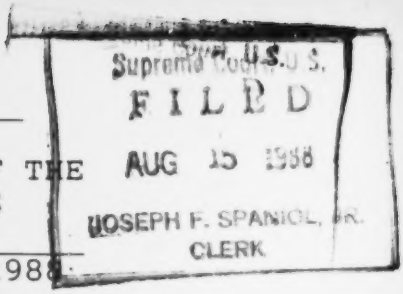
Thank you gain for your careful attention and consideration throughout the course of the trial. You will be excused at the conclusion of these proceedings until further notice from the clerk's office.

I wish to commend Mr. Mayo in the presentation of the government's case, and Mr. O'Connor and Mr. Weight in their representation of their respect clients.

Court will stand adjourned.

(Proceedings concluded.)

88-280



No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

MICHAEL F. MCCARTHY and
HAROLD T. OKAHARA
Petitioners

vs.

THE UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX (Superseding Indictment for Conspiracy and Mail and Wire Fraud - filed on March 7, 1985)

MICHAEL A. WEIGHT
Attorney at Law
A Law Corporation
Suite 430
735 Bishop Street
Honolulu, Hawaii
96813
(808)528-3255

Counsel of Record
for Petitioner
HAROLD T. OKAHARA

Of Counsel:
Reinwald, O'Connor,
Marrack, Hoskins &
Playdon
DENNIS EDWARD WATSON
O'CONNOR
JERROLD K. GUBEN
CHARLES EDWARD MCKAY
2400 PRI Tower
733 Bishop Street
Honolulu, Hawaii
96813
(808)524-8350
Counsel of Record for
Peitioner MICHAEL F. MCCARTHY

TABLE OF CONTENTS

PAGE

Superseding Indictment for Conspiracy and Mail and Wire Fraud.....1

DANIEL BENT
United States Attorney
District of Hawaii

FRANK A. WILSON
Assistant U. S. Attorney
STEPHEN A. MAYO
Special Assistant U. S. Attorney
Room C-242, U. S. Courthouse
300 Ala Moana Blvd., Box 50183
Honolulu, Hawaii 96850
Telephone: 546-7170

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED STATES OF AMERICA,	CR. NO. 85-00132-05
Plaintiff,	SUPERSEDING INDICTMENT FOR CONSPIRACY AND MAIL AND WIRE FRAUD
vs.	
DANIEL R. MATSUKAGE, (01)	
CURTIS J. BERNHARDT, (02)	(18 U.S.C. 371, 1341, 1343 AND 2)
MICHAEL F. McCARTHY, (03)	
HAROLD T. OKAHARA, JR., (04)	
and CARL J. BERNHARDT, (05)	
Defendants.	

[Filed on March 7, 1985]

SUPERSEDING INDICTMENT FOR
CONSPIRACY AND MAIL
AND WIRE FRAUD

COUNT 1 (CONSPIRACY)

THE GRAND JURY CHARGES:

A. INTRODUCTION

At times material to this indictment:

1. DANIEL R. MATSUKAGE, defendant herein, was the President of Pacific Standard Investment and Loan, Inc., and the President of Real Estate Finance Corporation.

2. Pacific Standard Investment and Loan, Inc., hereinafter referred to as PACIFIC, an industrial loan company, was organized and existing under the laws of the State of Hawaii, with its principal place of business located at 888 Mililani Street, Honolulu, Hawaii. PACIFIC was authorized by state law to solicit public funds for deposit into

PACIFIC and to make loans to the public provided that PACIFIC complied with the laws, regulations, restrictions, and limitations governing industrial loan companies in Hawaii.

3. Real Estate Finance Corporation, hereinafter referred to as REFC, a mortgage servicing company, was organized and existing under the laws of the State of Hawaii, with its principal place of business located at 888 Mililani Street, Honolulu, Hawaii. Pursuant to its agreements with mortgage companies, REFC would collect monthly mortgage payments, deposit those payments into trustee accounts at FDIC insured banks, forward monthly principal and interest payments to the mortgage companies, and pay property taxes and other mortgagor expenses when due.

4. CURTIS J. BERNHARDT, defendant herein, exercised control of

Norfolk Investment Company, Ltd. and Norfolk's associated companies.

4. CURTIS J. BERNHARDT, defendant herein, exercised control of Norfolk Investment Company, Ltd. and Norfolk's associated companies.

5. Norfolk Investment Co., Ltd., hereinafter referred to as NORFOLK, was organized and existing under the laws of the State of Hawaii, with its principal place of business located at 888 Mililani Street, Honolulu, Hawaii. NORFOLK and NORFOLK's associated companies were established for the purpose of attempting to profit from investments in real estate developments, oil ventures, fishing production and other interests.

6. MICHAEL F. McCARTHY, defendant herein, hold principal administrative positions in NORFOLK and various NORFOLK associated companies.

7. HAROLD T. OKAHARA, JR., defendant herein, a Certified Public Accountant, was the Chief Financial Officer for the NORFOLK and NORFOLK associated companies.

8. CARL J. BERNHARDT, defendant herein, held administrative positions in NORFOLK and various NORFOLK companies.

B. OBJECTS OF THE CONSPIRACY

From on or about December, 1977 and continuing through on or about December 3, 1981, in the District of Hawaii and elsewhere, DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR. and CARL J. BERNHARDT, defendants herein, and others, did willfully, knowingly and unlawfully combine, conspire, confederate and agree to commit offenses against the United States, that is:

1. To willfully and knowingly devise a scheme and artifice

to defraud and a scheme and artifice to obtain money and property by means of false and fraudulent pretenses, representations and promises, and by omissions of material facts and for the purpose of executing said scheme and artifice and attempting to do so did transmit and cause to be transmitted letters by means of the United States mail, in violation of Title 18, United States Code, Section 1341;

2. To willfully and knowingly devise a scheme and artifice to defraud and a scheme and artifice to obtain money and property by means of false and fraudulent pretenses, representations and promises and by omissions of material facts, and for the purpose of executing said scheme and artifice and attempting to do so did transmit and cause to be transmitted certain writings, signs, signals, and

sounds in interstate commerce by means of a wire communication, in violation of Title 18, United States Code, Section 1343.

C. WAYS AND MEANS OF ACCOMPLISHING CONSPIRACY

1. In furtherance of the conspiracy and as part of the scheme and artifice to defraud, the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., CARL J. BERNHARDT, from December 1977 and continuing until December 8, 1981 entered into and actively engaged in a community of business interests built upon mutual reliance, transactions and participation with each other to acquire, fund, maintain and expand the business interests of REFC, NORFOLK and NORFOLK's associated companies in real estate investment and development, oil

ventures, fishing production, and other interests, by fraudulently taking, transferring and diverting monies held in the care and custody of REFC and in the care and custody of PACIFIC.

2. In furtherance of the conspiracy and as part of the scheme and artifice to defraud, the defendants DANIEL M. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY and others, on or about December 28, 1978, when PACIFIC had a cash balance in its checking accounts of no more than $45,600, caused approximately $600,000 to be deposited and redeposited three different times in such a way to make it appear as if the capital stock of PACIFIC had increased by approximately $2,000,000, when in fact no such actual increase had taken place, so that the defendants could increase the total

amount of money that PACIFIC could solicit from public investors.

3. In furtherance of the conspiracy and as part of the scheme and artifice to defraud, the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, CARL J. BERNHARDT, and others from 1978 to 1980, designed, organized and implemented depositor solicitation programs to attract large amounts of funds from members of the public to be deposited and reinvested at PACIFIC, said solicitation programs offering high interest rates and other benefits to depositors.

These solicitation programs were:

(a) The six-month, $10,000 money-market investment certificate program,

(b) Smart Savers-Timberline Foods program,

(c) San Pedro Packers program,

(d) Simon and Seafort program,

(e) Slavish and Associates program,

(f) Jumbo interest program.

4. In furtherance of the conspiracy and as part of the scheme and artifice to defraud, the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., CARL J. BERNHARDT, and other, from 1979 to June, 1981, caused PACIFIC's funds, acquired through the depositor solicitation programs, to be loaned, disbursed and advanced, to the defendants, REFC, NORFOLK, and NORFOLK's associated companies and NORFOLK's employees, many of such loans, disbursements and advances being made to the detriment of PACIFIC and PACIFIC's depositors, contrary to safe and sound banking policy and practice, and in violation of

state banking laws, said loans, disbursements and advances, including but not limited to, the following:

04-01088	Velzeyland Properties 12/31/79 $3,000,000.00 Velzeyland Properties 01/05/81 $19,866.85 Velzeyland Properties 01/06/81 $15,000.00 Velzeyland Properties 01/06/81 $7,034.00 Velzeyland Properties 01/24/81 $40,000.00 Velzeyland Properties 01/30/81 $17,895.00 Velzeyland Properties 01/30/81 $10,000.00 Velzeyland Properties 01/29/81 $9,039.45 Velzeyland Properties 01/29/81 $2,500.00
04-01089	American Resources, Ltd. 12/31/79 $2,511,248.94 American Resources, Ltd. 01/30/81 $12,795.00
04-00997	Development, Inc. 08/30/79 $1,475,000.00
02-00865	Michael F. McCarthy 12/29/78 $1,046,392.00
02-00869	Michael F. McCarthy 01/11/79 $33,000.00
02-00987	Michael F. McCarthy 08/23/79 $106,007.50
02-00993	Michael F. McCarthy 08/29/79 $219,013.69

02-00994	Michael F. McCarthy 08/29/79 $160,000.00
02-00995	Michael F. McCarthy 08/29/79 $65,000.00
04-01013	Michael F. McCarthy 09/28/79 $83,650.00
04-01014	Michael F. McCarthy 09/28/79 $124,500.00
04-01015	Michael F. McCarthy 09/28/79 $93,150.00
02-01025	Michael F. McCarthy 10/10/79 $260,000.00
02-01030	Michael F. McCarthy 10/12/79 $200,000.00
01-01159	Michael F. McCarthy 05/07/80 $10,000.00
01-00958	San Pedro Packers 07/20/79 $50,000.00
02-01039	San Pedro Packers 08/10/79 $500,000.00
02-1040	San Pedro Packers 10/29/79 $225,000.00
04-01096	San Pedro Packers 12/13/79 $111,809.35
04-01008	Norfolk Investment Co., Ltd. 09/21/78 $90,000.00
04-00867	Norfolk Investment Co., Ltd. 12/29/78 $1,150,000.00

04-00866 Norfolk Investment Co., Ltd. 12/29/79 $800,000.00

04-00915 Real Estate Finance Corp. 05/25/79 $1,982,000.00

02-01012 Harold Okahara 09/28/79 $470,544.25

02-01033 Harold Okahara 10/17/79 $285,009.75

04-01062 Harold Okahara 11/19/79 $1,419,562.95

04-1152 Harold Okahara 05/02/80 $13,200.00

01-1153 Harold Okahara 05/02/80 $19,419.58

04-01162 Daniel R. Matsukage 05/22/80 $192,000.00

5. In furtherance of the conspiracy and as part of the scheme and artifice to defraud, the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., CARL J. BERNHARDT, and others from 1979 to June, 1981, caused and attempted to cause security and collateral for loans

previously made at PACIFIC to be released, subordinated and substituted for the benefit of the defendants, REFC, NORFOLK and NORFOLK's associated companies, such releases, subordinations and substitutions being made to the detriment of PACIFIC and PACIFIC's depositors, contrary to safe and sound banking policy and practice, and in violation of state banking laws, said releases, subordinations and substitutions being:

(a) The release and subordination of PACIFIC's secured position in or about April or May 1980, to Parks, Adams and Palmer on the $3,000,000, Velzeyland Properties, Ltd., loan, number 04-01088.

(b) The release and subordination of PACIFIC's secured position on or about September 8, 1980, to that of Commercial Finance on the $3,000,000,

Velzeyland Properties, Ltd., loan, number 04-01088.

(c) The release and substitutions of collateral and security on the $1,982,000 REFC loan, number 04-00915, as follows:

(1) On or about December 4, 1979, a third mortgage on Makawao, Maui, property was released.

(2) On or about January 24, 1980, a second deed of trust on the Sappherine subdivision, Alaska, was substituted as the new collateral.

(3) On January 14, 1981, the Sappherine subdivision second deed of trust was released.

(d) the release and substitutions and attempted releases and substitutions on or about March 25, 1981, of the collateral and security for the REFC loans at PACIFIC for the collateral and

security of the American Resources, Inc. and Velzeyland Properties, Ltd., loan.

6. In furtherance of the conspiracy and as part of the scheme and artifice to defraud the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., CARL J. BERNHARDT, and other caused PACIFIC, in order to create the appearance of a more favorable cash position at Pacific and to provide additional money to fund the defendants, the business activities of REFC, NORFOLK and NORFOLK's associated companies, to take in large deposits under circumstances and conditions unfavorable to the actual and ultimate financial condition of Pacific and contrary to safe and sound banking policy and practice, said deposits and uses being as follows:

(a) On or about February 8, 1980, a deposit into a thrift account at PACIFIC for escrow purposes, in the amount of $506,421.21.

(b) On or about February 20, 1981, the above deposit, with accrued interest ($617,246.08) was withdrawn and applied as a payment to the American Resources loan, number 04-01089.

(c) Deposits into a thrift account at PACIFIC, for Parks, Adams and Palmer, on or about:

DATES	AMOUNTS
April 17	$100,000
April 23	$300,000
April 30	$ 50,000
May 7	$ 90,000
May 12	$ 60,000
May 27	$151,000

(d) Disbursements to American Resources, on or about:

DATES	AMOUNTS
April 10	$ 85,000
May 8	$ 50,000
May 13	$ 65,000
May 16	$ 15,000
May 16	$ 9,000
June 5	$ 6,000
June 10	$ 3,000
June 23	$ 2,000
June 27	$ 1,000

(e) Disbursements under the following loans:

01-01159 MICHAEL F. McCARTHY
May 7, 1980 $10,000.00

04-01152 HAROLD T. OKAHARA, JR.
May 2, 1980 $13,200.00

04-01153 HAROLD T. OKAHARA, JR.
May 2, 1980 $19,419.58

04-01162 DANIEL R. MATSUKAGE
May 22, 1980 $192,000.00

(f) Reductions in the indebtedness of the following loans, in the following amounts:

NAME	ACCOUNT	AMOUNT
Velzeyland Properties	04-01088	$119,281.41
American Resources, Limited	04-01089	90,508.34
Associated Sunland Ventures, Inc.	05-01131	15,256.62
Norfolk Investment Co. Ltd.	01-01163	5,320.27
Michael F. McCarthy	01-01077	4,948.63
Harold T. Okahara, Jr.	01-01097	13,077.25
Harold T. Okahara, Jr.	01-01153	20,670.70
Harold T. Okahara, Jr.	01-01161	53,073.76
Harold T. Okahara, Jr.	04-01152	14,050.41
Laura Wong	01-01087	21,581.98
Robert Hoffman	04-00813	5,200.00
Harold Estes	02-00783	8,935.37
Michael F. McCarthy	01-01159	10,580.32
Norfolk Investment Co., Ltd.	04-01186	16,219.54

American Resources, Limited	01-01189	8,808.03
American Resources, Limited	01-01191	75,258.19
Accounts Rec. (Jewett Escrow)	135-003-0	18,138.00
Accounts Rec. (Norfolk)	135-011-0	14,677.63
A/R - Rental from Norfolk	135-011-0	24,200.00
Daniel R. Matsukage	04-01162	158,376.23
Closing costs - recording fee $7.00 Title VCCI - $38.40		45.40
		$698,208.08

7. In furtherance of and as part of the scheme and artifice to defraud, the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., CARL J. BERNHARDT, and others, from 1978 to August, 1981 caused large amounts of mortgage funds, collected by REFC from

home owners on behalf of their client mortgage companies, to be diverted to PACIFIC, NORFOLK and NORFOLK's associated companies, in violation of mortgage-servicing contracts between REFC and the mortgage companies.

8. In furtherance of and as part of the scheme and artifice to defraud, the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., CARL J. BERNHARDT, and others in 1980 and 1981, caused false and fraudulent entries, records, representations and omissions of material facts to be made, to be recorded and published by REFC to present the mortgage companies and the property owners from learning that the monthly mortgage funds had been diverted to PACIFIC, NORFOLK and NORFOLK's associated companies, said false and fraudulent entries, records,

representations and omissions being a) no recordation made of the transfers of REFC trust funds to PACIFIC, b) no recordation of advances to REFC, NORFOLK and NORFOLK companies, and c) no timely recordation of transfers of trust funds into the client mortgage accounts.

9. In furtherance of and as part of the scheme and artifice to defraud, the defendants and others from 1978 to June, 1981 caused false and fraudulent entries, records, representations and omissions of material facts to be made, recorded, published, and used by PACIFIC to prevent the depositors of PACIFIC from learning of the true and actual financial condition of PACIFIC, said false and fraudulent entries, records, representations and omissions of material facts being:

(a) The capital stock, cash position and thrift account amounts on

the year-ending and mid-year published financial statements of PACIFIC, for years 1978, 1970 and 1980.

(b) The cash on hand section of the daily cash position reports from June 3, 1980, to September 11, 1980, and from November 1, 1980, to November 15, 1980.

(c) The thrift account section on the daily cash position reports of 1980 and 1981 which did not reflect the transfer of illegally transferred REFC trust funds.

D. OVERT ACTS

To effect the objects of the conspiracy, the following overt acts were committed by the defendants in the District of Hawaii:

1. On or about December 30, 1977, CURTIS J. BERNHARDT, through his wholly-owned company, C.J.B. Holdings, Ltd., acquired the outstanding stock of

PACIFIC and REFC from DANIEL K. MATSUKAGE.

2. On or about June 30, 1978, CURTIS J. BERNHARDT, through his wholly-owned company, C.J.B. Holdings, Ltd., sold the PACIFIC and REFC stock back to DANIEL R. MATSUKAGE for $5,000,000.00 by a not and a pledge of shares of PACIFIC and REFC stock to NORFOLK as security.

3. On or about November 15, 1978, DANIEL R. MATSUKAGE authorized REFC to transfer $151,000 of its trust funds to NORFOLK.

4. On or about January 29, 1979, PACIFIC sent a letter to San Pedro Packers, Inc., c/o MICHAEL F. McCARTHY, signed by Lawrence W. K. Wong, relating to a PACIFIC agreement with MICHAEL McCARTHY wherein deposits of a minimum of $10,000.00 for a one-year term will earn interest at 10% per annum.

5. On or about February 1, 1979, DANIEL R. MATSUKAGE authorized REFC to transfer $60,000 of REFC trust funds to Norfolk.

6. On or about May 25, 1979, DANIEL R. MATSUKAGE authorized PACIFIC to loan REFC $1,982,000.00 under loan #00-04-00915.

7. On or about May 25, 1979, to September 30, 1979, DANIEL R. MATSUKAGE authorized REFC to transfer $708,885.00 of the loan #00-04-00915 funds to NORFOLK.

8. On or about July 27, 1979, a letter from PACIFIC signed by DANIEL R. MATSUKAGE advertising the Smart Savers card which enabled card holders to purchase meats and seafoods at reduced prices through Timberline Foods, was sent to existing PACIFIC customers.

9. On or about August 10, 1979 , DANIEL R. MATSUKAGE authorized PACIFIC

to advance San Pedro Packers, Inc. $149,507.50.

10. On or about July 30, 1979, DANIEL R. MATSUKAGE authorized PACIFIC to advance San Pedro Packers, Inc. $98,007.50.

11. On or about November 17, 1979, a meeting of DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY and others was held at PACIFIC office at which time CURTIS J. BERNHARDT outlined the formation of Velzeyland Properties and American Resources, Ltd.

12. In or about November, 1979, HAROLD T. OKAHARA received a copy of PACIFIC's Daily Cash Position.

13. On or about November 21, 1979, DANIEL R. MATSUKAGE authorized PACIFIC to advance $305,000.00 to HAROLD T. OKAHARA under loan number 04-1062.

14. On or about November 21, 1979, DANIEL R. MATSUKAGE authorized PACIFIC to advance $93,000.00 to HAROLD T. OKAHARA under loan number 04-1062.

15. On or about November 21, 1979, HAROLD T. OKAHARA made a check in the amount of $396,796.62 payable to MICHAEL F. McCARTHY.

16. On or about November 21, 1979, MICHAEL F. McCARTHY paid PACIFIC a total of $386,796.62 to be applied as payments on his loans.

17. On or about December 4, 1979, DANIEL R. MATSUKAGE released the security for REFC loan No. 04-00915.

18. On or about December 31, 1979, DANIEL R. MATSUKAGE authorized PACIFIC to make loan #04-01088 in the amount of $3,000,000.00 to Velzeyland Properties. Velzeyland Properties received cash of $730,000.00 and assumed

$2,342,139.82 loans of NORFOLK associated companies and HAROLD T. OKAHARA, JR.

19. On or about December 31, 1979, DANIEL R. MATSUKAGE authorized PACIFIC to make loan #04-01089, in the amount of $3,000,000 to American Resources, Ltd. American Resources, Ltd. received cash of $578,300.00 and the balance of $1,932,948.94 was used to assume several of MICHAEL F. McCARTHY's loans.

20. On or about February 20, 1981, DANIEL R. MATSUKAGE and MICHAEL F. McCARTHY caused $617,246.08 to be transferred from an REFC escrow account at PACIFIC to pay off part of the indebtedness under the American Resources loan, number 04-01089.

21. On or about March 24, 1980, DANIEL R. MATSUKAGE authorized a check for $65,000.00 from the account of Real

Estate Finance Corporation - Trustee for Pacific Standard Life Insurance Co. at Liberty Bank to purchase a cashier's check payable to O. R. Limited, a NORFOLK associated company.

22. On or about March 24, 1980, CARL J. BERNHARDT issued a $65,000 check, drawn on O. R., Ltd. at the Bank of Honolulu to pay for a wire transfer to Alaska Pacific Bank to the credit of NORFOLK's "Transfer Account".

23. On or about April 1, 1980, CURTIS J. BERNHARDT requested a representative of Parks, Adams and Palmer, a California partnership, to deposit approximately $600,000 into PACIFIC.

24. On or about April 23, 1980, DANIEL R. MATSUKAGE authorized the deposit of $300,000 from Parks, Adams and Palmer into a thrift account at PACIFIC.

25. On or about April 10, 1980, DANIEL R. MATSUKAGE authorized PACIFIC to advance $85,000.00 to American Resources, Ltd. under loan #04-01089.

26. On or about May 8, 1980, DANIEL R. MATSUKAGE authorized PACIFIC to advance $50,000.00 to American Resources, Ltd. under loan #04-01089.

27. On or about May 13, 1980, DANIEL R. MATSUKAGE authorized PACIFIC to advance $65,000.00 to American Resources, Ltd., under loan #04-01089.

28. On or about June 3, 1980, DANIEL R. MATSUKAGE received a check for $100,000.00 from CURTIS J. BERNHARDT.

29. From on or bout June 3, 1980, to September 11, 1980, DANIEL R. MATSUKAGE and CURTIS J. BERNHARDT caused employees of PACIFIC to hold in its "cash on hand" account a $100,000 check.

30. On or about July 7, 1980, DANIEL R. MATSUKAGE authorized REFC to

transfer mortgage trust fund money totalling $130,000.00 to its savings account "TA-560" at PACIFIC.

31. On or about August 5, 1980, DANIEL R. MATSUKAGE authorized REFC to transfer mortgage trust fund money totalling $100,000.00 to its savings account "TA-560" at PACIFIC.

32. From on or about November 1, 1980, to November 15, 1980, DANIEL R. MATSUKAGE and CURTIS J. BERNHARDT advised employees of PACIFIC to hold in its "cash on hand" account a $750,000 check.

33. On or about September 18, 1980, DANIEL R. MATSUKAGE authorized REFC to transfer mortgage trust fund money of $60,000.00 to its savings account "TA-560" at PACIFIC.

34. On or about November 7, 1980, DANIEL R. MATSUKAGE authorized REFC to

transfer mortgage trust fund money of $76,000.00 to PACIFIC.

35. On or about December 30, 1980, CURTIS J. BERNHARDT deposited $10,000.00 into his savings account "TA-01284" at PACIFIC to improve PACIFIC's year end cash position.

36. On or about December 30, 1980, CURTIS J. BERNHARDT deposited $75,000.00 into his savings account "TA-01802" at PACIFIC to improve PACIFIC's year end cash position.

37. On or about December 30, 1980, MICHAEL F. McCARTHY deposited $10,000.00 into his savings account "TA-01805" at PACIFIC to improve PACIFIC's year end cash position.

38. On or about January 5, 1981, CURTIS J. BERNHARDT withdrew the $10,000.00 from his savings account "TA-01284" at PACIFIC which he had deposited on December 30, 1980.

39. On or about January 5, 1981, CURTIS J. BERNHARDT withdrew the $75,000.00 from his savings account "TA-01802" at PACIFIC which he had deposited on December 30, 1980.

40. On or about January 5, 1981, MICHAEL F. McCARTHY withdrew $10,000.00 from his savings account "TA-01805" at PACIFIC which he had deposited on December 30, 1980.

41. On or about March 31, 1981, DANIEL R. MATSUKAGE authorized REFC to transfer mortgage trust fund money of $50,000.00 to its savings account "TA-560" at PACIFIC.

All in violation of Title 18, United States Code, Section 371 and Section 2.

COUNTS 2 THROUGH 74
(MAIL AND WIRE FRAUD)

THE GRAND JURY FURTHER CHARGES:

A. INTRODUCTION

At times material to this indictment:

1. DANIEL R. MATSUKAGE, defendant herein, was the president of Pacific Standard Investment and Loan, Inc., and the president of Real Estate Finance Corporation.

2. Pacific Standard Investment and Loan, Inc. hereinafter referred to as PACIFIC, an industrial loan company, was organized and existing under the laws of the State of Hawaii, with its principal place of business located at 888 Mililani Street, Honolulu, Hawaii. PACIFIC was authorized by state law to solicit public funds for deposit into PACIFIC and to make loans provided that PACIFIC complied with the laws,

regulations, restrictions, and limitations governing industrial loan companies in Hawaii.

3. Real Estate Finance Corporation, hereinafter referred to as REFC, a mortgage servicing company, was organized and existing under the laws of the State of Hawaii, with its principal place of business located at 888 Mililani Street, Honolulu, Hawaii. Pursuant to its agreements with mortgage companies, REFC would collect monthly mortgage payments, deposit those payments into trustee accounts at FDIC insured banks, forward monthly principal and interest payments to the mortgage companies, and pay property taxes and other mortgagor expenses when due.

4. CURTIS J. BERNHARDT, defendant herein, exercised control of Norfolk Investment Company, Ltd. and Norfolk's associated companies.

5. Norfolk Investment Co., Ltd., hereinafter referred to as NORFOLK, was organized and existing under the laws of the State of Hawaii, with its principal place of business located at 888 Mililani Street, Honolulu, Hawaii. NORFOLK and NORFOLK's associated companies were established for the purpose of attempting to profit from investments in real estate developments, oil ventures, fishing production and other interests.

6. MICHAEL F. McCARTHY, defendant herein, held principal administrative positions in NORFOLK and various NORFOLK associated companies.

7. HAROLD T. OKAHARA, JR., defendant herein, a Certified Public Accountant, was the Chief Financial Officer for the NORFOLK and NORFOLK associated companies.

8. CARL J. BERNHARDT, defendant herein, held administrative positions in NORFOLK and various NORFOLK companies.

B. SCHEME TO DEFRAUD

1. Beginning on or about December, 1977 and continuing to on or about September 8, 1981, within the District of Hawaii and elsewhere, DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR. and CARL J. BERNHARDT, defendants herein, and others, did devise, and intend to devise, a scheme and artifice to defraud and a scheme and artifice to obtain money and property by means of false and fraudulent pretenses, representations and promises and by omissions of material facts, well knowing at the time that the pretenses, representations and promises and omissions of material facts would be and were false when made and

the defendants, for the purpose of executing such scheme and artifice to defraud, and attempting to do so, (1) knowingly caused mail matter to be placed in an authorized depository for mail matter, to be sent and delivered by the United States Postal Service, according to the directions thereon, in violation of Title 18, United States Code, Sections 1341, and (2) knowingly caused wire transmissions of writings, signs, signals and sounds in interstate commerce, in violation of Title 18, United States Code, Sections 1343.

2. The scheme was devised:

a) To defraud the REFC client mortgage companies of money belonging to the mortgage companies, which had been collected by REFC, by fraudulently diverting the money held in trust by REFC. This money was diverted by the defendants:

1) to PACIFIC to improve its deficit cash position and provide operating cash to PACIFIC; and,

2) to NORFOLK and NORFOLK's associated companies to support and finance its business interests.

b) to defraud home owners who made monthly mortgage payments to REFC on their mortgages and property taxes by fraudulently diverting the money REFC was to have paid to the City and County of Honolulu for property taxes and for other mortgagor expenses. This money was diverted by the defendants:

1) to PACIFIC to improve its deficit cash position and provide operating cash to PACIFIC, and

2) to NORFOLK and NORFOLK's associated companies to support and finance its business interests.

c) to defraud depositors of PACIFIC by providing money from public depositors to REFC, NORFOLK, NORFOLK's associated companies and NORFOLK employees:

1) without obtaining proper security to protect the deposits of PACIFIC,

2) making loans in amounts and under conditions which violated the conditions under which they were licensed to receive deposits from the public by State of Hawaii banking laws,

3) falsifying the records of PACIFIC to conceal PACIFIC's true financial position, and

4) Using the money from deposits in PACIFIC contrary to, and inconsistent with, safe and sound banking policy and practices.

C. ACTS BY THE DEFENDANTS IN FURTHERANCE OF THE SCHEME

1. In furtherance of the scheme and artifice to defraud the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., CARL J. BERNHARDT, from December, 1977 and continuing until December 8, 1981 entered into and actively engaged in a community of business interests built upon mutual reliance, transactions and participation with each other to acquire, fund, maintain and expand the business interests of REFC, NORFOLK and NORFOLK's associated companies in real estate investment and development, oil ventures, fishing production, and other interests, by fraudulently taking, transferring and diverting monies held in the care and custody of REFC and in the care and custody of PACIFIC.

2. in Furtherance of and as part of the scheme and artifice to defraud, the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, and others, on or about December 28, 1978, when PACIFIC had a cash balance in its checking account of no more than $45,600, caused approximately $600,000 to be deposited and redeposited three different times in such a way to make it appear as if the capital stock of PACIFIC had increased by approximately $2,000,000, when in fact no such actual increase had taken place, so that the defendants could increase the total amount of money that PACIFIC could solicit from public investors.

3. In furtherance of and as part of the scheme and artifice to defraud, the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F.

McCARTHY, CARL J. BERNHARDT, and others, from 1978 to 1980, designed, organized and implemented depositor solicitation programs to attract large amounts of funds from members of the public to be deposited and reinvested at PACIFIC, said solicitation programs offering high interest rates and other said solicitation programs offering high interest rates and other benefits to depositors. These solicitation programs were:

(a) The six-month, $10,000 money-market investment certificate program,

(b) Smart Savers-Timberline Foods program,

(c) San Pedro Packers program,

(d) Simon and Seafort program,

(e) Slavish and Associates program,

(f) Jumbo interest program.

4. In furtherance of and as part of the scheme and artifice to defraud, the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., CARL J. BERNHARDT, and others, from 1979 to June, 1981, caused PACIFIC's funds, acquired through the depositor solicitation programs, to be loaned, disbursed and advanced to the defendants, REFC, NORFOLK, and NORFOLK's associated companies and NORFOLK's employees, many of such loans, disbursements and advances being made to the detriment of PACIFIC and PACIFIC's depositors, contrary to safe and sound banking policy and practice, and in violation of state banking laws, said loans disbursements and advances being:

ACCOUNT NO.	NAME
04-01088	Velzeyland Properties
DATE	**AMOUNT**
12/31/79	$3,000,000.00
01/05/81	19,866.85
01/06/81	15,000.00
01/06/81	7,034.00
01/24/81	40,000.00
01/30/81	17,895.00
01/30/81	10,000.00
01/29/81	9,039.45
01/29/81	2,500.00
ACCOUNT NO.	**NAME**
04-01089	American Resources, Ltd.
DATE	**AMOUNT**
12/31/79	$2,511,248.94
01/30/81	12,795.00
ACCOUNT NO.	**NAME**
04-00997	Development, Inc.
DATE	**AMOUNT**
08/30/79	$1,475,000.00
ACCOUNT NO.	**NAME**
02-00865	Michael F. McCarthy
DATE	**AMOUNT**
12/29/78	$1,046,392.00

ACCOUNT NO.	NAME
02-00869	Michael F. McCarthy
DATE	AMOUNT
01/11/79	$ 33,000.00
ACCOUNT NO.	NAME
02-00987	Michael F. McCarthy
DATE	AMOUNT
08/23/79	$ 106,007.50
ACCOUNT NO.	NAME
02-00993	Michael F. McCarthy
DATE	AMOUNT
08/29/79	$ 219,013.69
ACCOUNT NO.	NAME
02-00994	Michael F. McCarthy
DATE	AMOUNT
08/29/79	$ 160,000.00
ACCOUNT NO.	NAME
02-00995	Michael F. McCarthy
DATE	AMOUNT
08/29/79	$ 65,000.00

ACCOUNT NO.	NAME
04-01013	Michael F. McCarthy
DATE	AMOUNT
09/28/79	$ 83,650.00
ACCOUNT NO.	NAME
04-01014	Michael F. McCarthy
DATE	AMOUNT
09/28/79	$ 124,500.00
ACCOUNT NO.	NAME
04-01015	Michael F. McCarthy
DATE	AMOUNT
09/28/79	$ 93,150.00
ACCOUNT NO.	NAME
02-01025	Michael F. McCarthy
DATE	AMOUNT
10/10/79	$ 260,000.00
ACCOUNT NO.	NAME
02-01030	Michael F. McCarthy
DATE	AMOUNT
10/12/79	$ 200,000.00

ACCOUNT NO.	NAME
01-01159	Michael F. McCarthy
DATE	AMOUNT
05/07/80	$ 10,000.00
ACCOUNT NO.	NAME
01-00958	San Pedro Packers
DATE	AMOUNT
07/20/79	$ 50,000.00
ACCOUNT NO.	NAME
02-01039	San Pedro Packers
DATE	AMOUNT
08/10/79	$ 500,000.00
ACCOUNT NO.	NAME
02-1040	San Pedro Packers
DATE	AMOUNT
10/29/79	$ 225,000.00
ACCOUNT NO.	NAME
04-01096	San Pedro Packers
DATE	AMOUNT
12/31/79	$ 111,809.35

ACCOUNT NO.	NAME
04-01008	Norfolk Investment Co., Ltd.
DATE	AMOUNT
09/21/78	$ 90,000.00
ACCOUNT NO.	NAME
04-00867	Norfolk Investment Co., Ltd.
DATE	AMOUNT
12/29/78	$1,150,000.00
ACCOUNT NO.	NAME
04-00866	Norfolk Investment Co., Ltd.
DATE	AMOUNT
12/29/79	$ 800,000.00
ACCOUNT NO.	NAME
04-00915	Real Estate Finance Corp.
DATE	AMOUNT
05/25/79	$1,982,000.00
ACCOUNT NO.	NAME
02-01012	Harold Okahara
DATE	AMOUNT
09/28/79	$ 470,544.25

ACCOUNT NO.	NAME
02-01033	Harold Okahara
DATE	AMOUNT
10/17/79	$ 285,009.75
ACCOUNT NO.	NAME
04-01062	Harold Okahara
DATE	AMOUNT
11/19/79	$1,419,562.95
ACCOUNT NO.	NAME
04-1152	Harold Okahara
DATE	AMOUNT
05/20/80	$ 13,200.00
ACCOUNT NO.	NAME
01-1153	Harold Okahara
DATE	AMOUNT
05/02/80	$ 19,419.58
ACCOUNT NO.	NAME
04-01162	Daniel R. Matsukage
DATE	AMOUNT
05/22/80	$ 192,000.00

5. In furtherance of and as part of the scheme and artifice to defraud,

the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., CARL J. BERNHARDT, and others from 1979 to June, 1981, caused and attempted to cause security and collateral for loans previously made at PACIFIC to be released, subordinated and substituted for the benefit of the defendants, REFC, NORFOLK and NORFOLK's associated companies, such releases, subordinations and substitutions being made to the detriment of PACIFIC and PACIFIC's depositors, contrary to safe and sound banking policy and practice, and in violation of state banking laws, said releases, subordinations and substitutions being:

(a) The release and subordination of PACIFIC's secured position on or about April or May, 1980, to Parks, Adams and Palmer on the $3,000,000,

Velzeyland Properties, loan, number 04-01088.

(b) The release and subordination of PACIFIC's secured position on or about September 8, 1980, to that of Commercial Finance on the $3,000,000, Velzeyland Properties, loan, number 04-01088.

(c) The release and substitutions of collateral and security on the $1,982,000, REFC loan, number 04-00915, as follows:

(1) On or about December 4, 1979, a third mortgage on Makawao, Maui, property was released.

(2) On or about January 24, 1980, a second deed of trust on the Sappherine subdivision, Alaska, was substituted as the new collateral.

(3) On January 14, 1981, the Sappherine subdivision second deed of trust was released.

(d) the release and substitutions and attempted releases and substitutions on or about March 25, 1981, of the collateral and security for the REFC loans at PACIFIC for the collateral and security of the American Resources, Inc. and Velzeyland Properties, Ltd., loan.

6. In furtherance of the scheme and artifice to defraud the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., CARL J. BERNHARDT, and others caused PACIFIC, in order to remedy the significant negative cash reserve position at Pacific, and to provide additional money to fund the defendants and the business activities of REFC, NORFOLK and NORFOLK's associated companies, to take in large deposits under circumstances and conditions unfavorable to the actual and ultimate financial condition of Pacific

and contrary to safe and sound banking policy and practice, said deposits and uses being as follows:

(a) On or about February 8, 1980, a deposit into a thrift account at PACIFIC for escrow purposes, in the amount of $506,421.21.

(b) On or about February 20, 19891, the above deposit with accrued interest ($617,246.08), was withdrawn and applied as a payment to the American Resources loan, number 04-01089.

(c) Deposits into a thrift account at PACIFIC, for Parks, Adams and Palmer, on or about:

DATES	AMOUNTS
April 17	$100,000
April 23	$300,000
April 30	$ 50,000
May 7	$ 90,000
May 12	$ 60,000
May 27	$151,000
April 10	$ 85,000
May 8	$ 50,000
May 13	$ 65,000
May 16	$ 15,000
May 16	$ 9,000
June 5	$ 6,000

June 10	$ 3,000
June 23	$ 2,000
June 27	$ 1,000

(e) Disbursements under the following loans:

ACCOUNT NO.	NAME
01-01159	MICHAEL F. McCARTHY
DATE	AMOUNT
May 7, 1980	$10,000.00
ACCOUNT NO.	NAME
04-01152	HAROLD T. OKAHARA, JR.
DATE	AMOUNT
May 2, 1980	$13,200.00
ACCOUNT NO.	NAME
04-01153	MICHAEL F. McCARTHY
DATE	AMOUNT
May 2, 1980	$19,419.58
ACCOUNT NO.	NAME
01-01162	DANIEL R. MATSUKAGE
DATE	AMOUNT
May 22, 1980	$192,000.00

(f) Reductions in the indebtedness of the following loans, in the following amounts:

NAME	ACCOUNT	AMOUNT
Velzeyland Properties	04-01088	$119,281.41
American Resources, Limited	04-01089	90,508.34
Associated Sunland Ventures, Inc.	05-01131	15,256.62
Norfolk Investment Co., Ltd.	01-01163	5,320.27
Michael F. McCarthy	01-01077	4,948.63
Harold T. Okahara, Jr.	01-01097	13,077.25
Harold T. Okahara, Jr.	01-01153	20,670.70
Harold T. Okahara, Jr.	01-01161	53,073.76
Harold T. Okahara, Jr.	04-01152	14,050.41
Laura Wong	01-01087	21,581.98
Robert Hoffman	04-00813	5,200.00
Harold Estes	02-00783	8,935.37

Michael F. McCarthy	01-01159	10,580.32
Norfolk Investment Co., Ltd.	04-01186	16,219.54
American Resources, Limited	01-01189	8,808.03
American Resources, Limited	01-01191	75,258.19
Accounts Rec. (Jewett Escrow)	135-011-0	18,138.00
Accounts Rec. (Norfolk)	135-011-0	14,677.63
A/R - Rental from Norfolk	135-011-0	24,200.00
Daniel R. Matsukage	04-01162	158,376.23
Closing costs- recording fee - $7.00 Title VCCI - $38.40		45.40
		$698,208.08

7. In furtherance of and as part of the scheme and artifice to defraud, the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F.

McCARTHY, HAROLD T. OKAHARA, JR., CARL J. BERNHARDT, and others; from 1978 to August, 1981 caused large amounts of mortgage funds, collected by REFC from home owners on behalf of their client mortgage companies, to be diverted to PACIFIC, NORFOLK and NORFOLK's associated companies, in violation of mortgage-servicing contracts between REFC and the mortgage companies.

8. In furtherance of and as part of the scheme and artifice to defraud, the defendants DANIEL R. MATSUKAGE, CURTIS J. BERNHARDT, MICHAEL F. McCARTHY, HAROLD T. OKAHARA, JR., CARL J. BERNHARDT, and others in 1980 and 1981, caused false and fraudulent entries, records, representations and omissions of material facts to be made, to be recorded and published by REFC to prevent the mortgage companies and the property owners from learning that the

monthly mortgage funds had been diverted to PACIFIC, NORFOLK and NORFOLK's associated companies, said false and fraudulent entries, records, representations and omissions being a) no recordation made of the transfers of REFC trust funds to PACIFIC, b) no recordation of advances to REFC, NORFOLK and NORFOLK companies, and c) no timely recordation of transfers of trust funds into the client mortgage accounts.

9. In furtherance of and as part of the scheme and artifice to defraud, the defendants and others from 1978 to June, 1981 caused false and fraudulent entries, records, representations and omissions of material facts to be made, recorded, published, and used by PACIFIC to prevent the depositors of PACIFIC from learning of the true and actual financial condition of PACIFIC, said false and fraudulent entries, records,

representations and omissions of material facts being:

(a) The capital stock, cash position and thrift account amounts on the year-ending and mid-year published financial statements of PACIFIC, for years 1978, 1979 and 1980.

(b) The cash on had section of the daily cash position reports from June 3, 1980, to September 11, 1980, and from November 1, 1980, to November 15, 1980.

(c) The thrift account section on the daily cash position reports of 1980 and 1981 which did not reflect the transfer of illegally transferred REFC trust funds.

D. THE MAILINGS
(COUNTS 2 THROUGH 49)

For the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants

knowingly caused, on or about the date designated below, to be delivered by the United States Postal Service, according to the directions thereon, an envelope containing the monthly mortgage payment from the victim owner designated below, said envelop addressed to Real Estate Finance Corporation, 888 Mililani Street, Honolulu, Hawaii:

COUNT NUMBER	DATE OF MAILING	VICTIM HOME OWNER
2	April 1, 1980	Yutaka Miyazaki 46-084 Maeka Place, Kaneohe, Hawaii
3	April 1, 1980	Paul C. Diggs 2334 Komo Mai Drive Pearl City, Hawaii

4	April 1, 1980	Mrs. Ethel Tanaka 45-305 Makalani Street Kaneohe, Hawaii
5	April 1, 1980	Claudio Casupang 2008 Aamomi Street Pearl City, Hawaii
6	April 1, 1980	Walter Nakaki 2485 Aapi Place Pearl City, Hawaii
7	July 1, 1980	Yutaka Miyazaki 46-084 Maeka Place Kaneohe, Hawaii
8	July 1, 1980	Paul C. Diggs 2334 Komo Mai Drive Pearl City, Hawaii
9	July 1, 1980	Sakao Nasu 1349 Ala Aolani Street Honolulu, Hawaii

10	July 1, 1980	Wynne Wilhelmina 672 Ulumalu Street Kailua, Hawaii
11	July 1, 1980	Adam Soliven 2560 Komo Mai Drive Pearl City, Hawaii
12	July 1, 1980	Vincent S. Aoki, M.D. 321 N. Kuakini St., #508 Honolulu, Hawaii
13	August 1, 1980	Yutaka Miyazaki 46-084 Maeka Place Kaneohe, Hawaii
14	August 1, 1980	Carol Levi 1636 Hoolaulea Street Pearl City, Hawaii
15	August 1, 1980	Mrs. Ethel Tanaka 45-305 Makalani Street Kaneohe, Hawaii

16	August 1, 1980	Nancy Nagata 1534 Ala Aoloa Loop Honolulu, Hawaii
17	August 1, 1980	Ronald Shinmoto 1551 Ala Aoloa Loop Honolulu, Hawaii
18	September 1, 1980	Yutaka Miyazaki 46-084 Maeka Place Kaneohe, Hawaii
19	September 1, 1980	Claudio Casupang 2008 Aamomi Street Pearl City, Hawaii
20	September 1, 1980	Lung Ting Liang 461 Opihikao Place Honolulu, Hawaii
21	September 1, 1980	Julie Kashiwamura 1745 Ala Aolani Place Honolulu, Hawaii

22	September 1, 1980	Robert Jenkins 1654 Hoonipo Street Pearl City, Hawaii
23	November 1, 1980	Yutaka Miyazaki 46-084 Maeka Place, Kaneohe, Hawaii
24	November 1, 1980	Walter Nakaki 2485 Aapi Place, Pearl City, Hawaii
25	November 1, 1980	Norito Sagawa, 1828 Ala Aolani Street, Honolulu, Hawaii
26	November 1, 1980	Cynthia Fujikawa 1751 Ala Noe Way Honolulu, Hawaii
27	March 1, 1981	Yutaka Miyazaki 46-084 Maeka Place, Kaneohe, Hawaii

28	March 1, 1981	Paul C. Diggs, 2334 Komo Mai Drive, Pearl City, Hawaii
29	March 1, 1981	Jack Hokama 45-062 Namoku Street Kaneohe, Hawaii
30	March 1, 1981	Edgar T. Ideta, 45-532 Alokahi Place, Kaneohe, Hawaii

All in violation of Title 18, United States Code, Section 1341 and Section 2.

COUNTS 31 THROUGH 39

For the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants knowingly caused, on or about the date designated below, to be delivered by the United States Postal Service, according to the directions thereon, an envelope

containing a certification of payment of property taxes from Real Estate Finance Corporation, 888 Mililani Street, Honolulu, Hawaii, addressed to the victim mortgage company designated below:

COUNT NUMBER	DATE OF MAILING	VICTIM MORTGAGE COMPANY
31	March 25, 1981	Burritt Mutual Savings Bank 267 Main Street New Britain, Connecticut
32	August 26, 1980	Burritt Mutual Savings Bank 267 Main Street New Britain, Connecticut
33	March 25, 1981	Western Federal Savings & Loan Association of Denver, P.O. Box 5807 T.A. Denver, Colorado 80217
34	August 26, 1980	Eagle Savings Association 580 Walnut Street, Cincinnati, Ohio 45202

35	August 26, 1980	Bankers National Life Insurance Co., Parsippany, New Jersey 07051
36	August 26, 1980	Security Federal Savings & Loan Association, 1209 Milwaukee Avenue, Chicago, IL 60622
37	March 25, 1981	Security Federal Savings & Loan Association, 1209 Milwaukee Avenue, Chicago, IL 60622
38	August 26, 1980	People's Federal Savings & Loan Association 121 N. Market Street, Wooster, Ohio 44691
39	March 25, 1981	People's Federal Savings & Loan Association 121 N. Market Street, Wooster, Ohio 44691

All in violation of Title 18, United States Code, Sections 1341 and 2.

COUNT 40

For the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants knowingly caused, on or about March 14, 1980, to be delivered by the United States Postal Service, according to the directions thereon, an envelope containing the PACIFIC solicitation program pamphlets from American Resources, Limited, 733 Bishop Street, Suite 2540, Honolulu, Hawaii, to Brian Adams, c/o Parks, Adams & Palmer, 465 So. Beverly Drive, Beverly Hills, California.

All in violation of Title 18, United States Code, Section 1341 and Section 2.

COUNT 41

For the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants knowingly caused, on or about April 14, 1980, to be delivered by the United States Postal Service, according to the directions thereon, an envelope containing a letter and a copy of the financial condition of PACIFIC, INC. as of the close of business of December 31, 1979, from Michael F. McCarthy, Attorney at Law, 2117 Keeaumoku Street, Honolulu, Hawaii, to Jim Palmer, Parks, Adams & Palmer, Certified Public Accountant, 465 S. Beverly Drive, Beverly Hills, California.

All in violation of Title 18, United States Code, Section 1341 and Section 2.

COUNT 42

For the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants knowingly caused, on or about May 6, 1980, to be delivered by the United States Postal Service, according to the directions thereon, an envelope containing a letter authorizing the issuance of a wire transfer from Parks, Adams & Palmer, Certified Public Accountant, 465 So. Beverly Drive, Beverly Hills, California, to Westwood National Bank, Los Angeles, California.

All in violation of Title 18, United States Code, Section 1341 and Section 2.

COUNT 43

For the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants knowingly caused, on or about May 27,

1980, to be delivered by the United States Postal Service, according to the directions thereon, an envelope containing a letter of receipt of $151,000.00 for deposit into the escrow account from Real Estate Finance Corporation, 888 Mililani Street, Honolulu, Hawaii, to Parks, Adams & Palmer, Certified Public Accountant, 465 So. Beverly Drive, Beverly Hills, California.

All in violation of Title 18, United States Code, Section 1341 and Section 2.

COUNT 44

The Grand Jury further charges:

For the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants knowingly caused, on or about June 30, 1980, to be delivered by the United States Postal Service, according to the

directions thereon, an envelope containing a letter stating the amount of interest due Parks, Adams & Palmer from Parks, Adams & Palmer, Certified Public Accountant, 465 S. Beverly Drive, Beverly Hills, California to Harold Okahara, Velzeyland Properties, 888 Mililani Street, #201, Honolulu, Hawaii.

All in violation of Title 18, United States Code, Section 1341 and Section 2.

COUNTS 45 THROUGH 48

For the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants knowingly caused, on or about December 8, 1981, to be delivered by the United States Postal Service, according to the directions thereon, a Western Union mailgram containing an intent to sell REFC's mortgage servicing portfolio

from Real Estate Finance Corporation, 888 Mililani Street, Honolulu, Hawaii, addressed to the victim mortgage company designated below:

Count Number	Victim Mortgage Company
45	Bankers National Life Insurance Co., 1599 Littleton Road, Parsipanny, New Jersey 07051
46	Burritt Mutual Savings Bank, 267 Main Street New Britain, Connecticut 06051
47	Crestmont Savings and Loan Association, 1886 Springfield Avenue Maplewood, New Jersey 07040
48	Magyar Savings and Loan Association, P. O. Box 1365, New Brunswick, New Jersey 08903

All in violation of Title 18, United States Code, Section 1341 and Section 2.

COUNTS 49 through 66

For the purpose of executing the aforesaid scheme and artifice to defraud

and attempting to do so, the defendants knowingly caused, on or about the date designated below, to be delivered by the United States Postal Service, according to the directions thereon, an envelope containing a monthly mortgage company trial balance from Real Estate Finance Corporation, 888 Mililani Street, Honolulu, Hawaii, addressed to the victim mortgage company designated below:

COUNT NUMBER	DATE OF MAILING	VICTIM MORTGAGE COMPANY
49	July 20,1980	Pacific Standard Life Insurance Company P.O. Box 1796, Sacramento, CA 95808

50	July 20, 1980	Northern Federal Savings and Loan Association Sixth at Washa, St. Paul, MN 55102
51	July 20, 1980	Crestmont Savings and Loan Association 1886 Springfield Avenue Maplewood, NJ 07040
52	July 20, 1980	Peoples Federal Savings and Loan Association 121 N. Market Street, Wooster OH 44691
53	July 20, 1980	Anaheim Savings and Loan Association 112 Lemon Street Anaheim, CA 92803

54	July 20, 1980	Dry Dock Savings Bank 742 Lexington Avenue New York, NY 10022
55	August 20, 1980	Eagles Savings Association 580 Walnut Street Cincinnati, OH 45202
56	August 20, 1980	First National Savings formerly known as: West Side Federal Savings and Loan Association P.O. Box 850 Daley City, CA 94017
57	August 20, 1980	Western Federal Savings and Loan Association of Denver 700 17th Street Denver, CO 80202

58	August 20, 1980	Magyar Savings and Loan Association P.O. Box 1365, New Brunswick, NJ 08903
59	August 20, 1980	North Side Savings Bank 185 West 231st Street Bronx, NY 10463
60	August 20, 1980	Pacific Standard Life Insurance Company P.O. Box 1796 Sacramento, CA 95808
61	July 20, 1980	Seamen's Bank for Savings P.O. Box 540 New York, NY 10005
62	September 20, 1980	Seamen's Bank for Savings P.O. Box 540 New York, NY 10005

63	October 20, 1980	Seamen's Bank for Savings P.O. Box 540 New York, NY 10005
64	October 20, 1980	North Side Savings Bank 185 West 231st Street Bronx, New York 10463
65	October 20, 1980	First Nationwide Savings formerly known as West Side Federal Savings and Loan Association P.O. Box 850 Daley City, CA 94107
66	April 20, 1980	Pacific Standard Life Insurance Company, P.O. Box 1796, Sacramento, CA 95808

All in violation of Title 18, United States Code, Section 1341 and 2.

E. WIRES
(COUNTS 67 THROUGH 74)

For the purpose of executing the aforesaid scheme and artifice to defraud and attempting to do so, the defendants knowingly transmitted and caused to be transmitted on the date designated below, certain writings, signs, signals, and sounds in interstate commerce by means of a wire communication, that is a wire transfer of funds, between Hawaii and the bank and location designated in the amount designated below:

COUNT NUMBER	DATE WIRE OF TRANSMISSION
67	04/17/80
BANK LOCATION	AMOUNT
United California Bank, Los Angeles, California	$100,000.00

COUNT NUMBER	DATE WIRE OF TRANSMISSION
68	04/23/80
BANK LOCATION	AMOUNT
Bank of America, San Francisco, California	$300,000.00

COUNT NUMBER	DATE WIRE OF TRANSMISSION
69	04/30/80
BANK LOCATION	AMOUNT
United California Bank, Los Angeles, California	$50,000.00

COUNT NUMBER	DATE WIRE OF TRANSMISSION
70	05/07/80
BANK LOCATION	AMOUNT
Security Pacific National Bank, Los Angeles California	$90,000.00

COUNT NUMBER	DATE WIRE OF TRANSMISSION
71	05/12/80
BANK LOCATION	AMOUNT
Security Pacific National Bank, Los Angeles California	$60,000.00

COUNT NUMBER	DATE WIRE OF TRANSMISSION
72	02/08/80
BANK LOCATION	AMOUNT
Bank of America, San Francisco, California	$506,421.21

COUNT NUMBER	DATE WIRE OF TRANSMISSION
73	03/24/80
BANK LOCATION	AMOUNT
Alaska Pacific Bank Anchorage, Alaska	$65,000.00

COUNT NUMBER	DATE WIRE OF TRANSMISSION
74	01/04/80
BANK LOCATION	AMOUNT
Alaska Pacific Bank Anchorage, Alaska	$250,000.00

All in violation of Title 18, United States Code, Section 1343 and Section 2.

DATED: _____, at Honolulu, Hawaii.

A TRUE BILL

_____
FOREPERSON, GRAND JURY

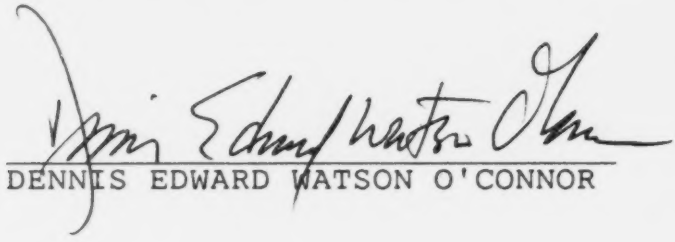
_____
UNITED STATES ATTORNEY

_____
ASSISTANT UNITED STATES ATTORNEY

_____
SPECIAL ASSISTANT U.S. ATTORNEY

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of August, 1988, three copies of the Supplemental Appendix (Superseding Indictment for Conspiracy and Mail and Wire Fraud) will be mailed, postage prepaid, to Daniel Bent, United States District Courthouse, 300 Ala Moana Boulevard, Room C-242, Honolulu, Hawaii 96813; John F. DePue, Appellate Justice, Washington D.C. 20530. I further certify that all parties required to be served have been served.



DENNIS EDWARD WATSON O'CONNOR

Supreme Court, U.S.
FILED
OCT 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 88-280

In the Supreme Court of the United States

OCTOBER TERM, 1988

MICHAEL F. MCCARTHY AND
HAROLD OKAHARA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

EDWARD S.G. DENNIS, JR.
Assistant Attorney General

JOHN F. DE PUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

10 pp

QUESTIONS PRESENTED

1. Whether the acts alleged in counts 2-30 of the indictment constituted the offense of mail fraud.

2. Whether a midtrial judgment of acquittal of petitioners on the other 45 counts of the indictment, which charged mail fraud, wire fraud, and conspiracy, collaterally estops the government from trying petitioners on counts 2-30, which had been dismissed before trial at petitioners' request but were reinstated on appeal.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Arizona v. *Washington*, 434 U.S. 497 (1978) 12
Ashe v. *Swenson*, 397 U.S. 436 (1970) 6, 9, 12
Blockburger v. *United States*, 284 U.S. 299 (1932) 11
Carter v. *Estelle*, 677 F.2d 427 (5th Cir. 1982), cert. denied, 460 U.S. 1056 (1983) 12
Ohio v. *Johnson*, 467 U.S. 493 (1984) 10
Parr v. *United States*, 363 U.S. 370 (1960) 4, 5, 6, 7, 8
Ricketts v. *Adamson*, No. 86-6 (June 22, 1987) 10
Schmuck v. *United States*, cert. granted, No. 87-6431 (May 16, 1988) 8
Standefer v. *United States*, 447 U.S. 10 (1980) 12
Sedgwick v. *Superior Court*, 584 F.2d 1044 (D.C. Cir. 1978), cert. denied, 439 U.S. 1075 (1979) 12
United States v. *Allen*, 539 F. Supp. 296 (C.D. Cal. 1982) 12
United States v. *Ashley Transfer & Storage Co.*, No. 87-5153 (4th Cir. Oct. 3, 1988) 10, 12
United States v. *Baugus*, 761 F.2d 506 (8th Cir. 1985) 12
United States v. *Bright*, 588 F.2d 504 (5th Cir.), cert. denied, 440 U.S. 972 (1979) 8
United States v. *Dinitz*, 424 U.S. 600 (1976) 10
United States v. *Genser*, 710 F.2d 1426 (10th Cir. 1983) .. 12
United States v. *Green*, 786 F.2d 247 (7th Cir. 1986) 7
United States v. *Jeffers*, 432 U.S. 137 (1977) 10
United States v. *Maker*, 751 F.2d 614 (3d Cir. 1984), cert. denied, 472 U.S. 1017 (1985) 12
United States v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977) 12

Cases—Continued: Page

United States v. *Mitchell*, 744 F.2d 701 (9th Cir. 1984) ... 7
United States v. *Primrose*, 718 F.2d 1484 (10th Cir. 1983), cert. denied, 466 U.S. 974 (1984) 7-8
United States v. *Scott*, 437 U.S. 82 (1978) 10, 11, 12

Constitution, statutes and rule:

U.S. Const. Amend. V (Double Jeopardy Clause) 2, 9, 10, 12
Sherman Act § 1, 15 U.S.C. 1 11
18 U.S.C. 371 2
18 U.S.C. 1341 ..... 2, 7
18 U.S.C. 1343 2
Fed. R. Crim. P. 29(a) 5

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-280

MICHAEL F. MCCARTHY AND
HAROLD OKAHARA, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A53), as amended (see Pet. App. C1-C3, E1-E3), is reported at 840 F.2d 1441.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 1988. A petition for rehearing was denied on June 15, 1988 (Pet. App. F1-F2). The petition for a writ of certiorari was filed on August 15, 1988 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On March 7, 1985, a grand jury in the District of Hawaii indicted petitioners and three co-defendants on one count of conspiracy, in violation of 18 U.S.C. 371 (count 1); 65 counts of mail fraud, in violation of 18 U.S.C. 1341 (counts 2-66); and eight counts of wire fraud, in violation of 18 U.S.C. 1343 (counts 67-74). The district court dismissed 29 of the mail fraud counts on the ground that they failed to allege an offense. While the government's appeal from that dismissal was pending, petitioners proceeded to trial on the 45 remaining counts. At the close of the government's case, the district court entered judgments of acquittal on those 45 counts. The court of appeals subsequently reversed the dismissal of the other 29 counts and remanded for trial. Petitioners contend that the court of appeals erred in reversing the order of dismissal and that, in any event, trial of the 29 pending counts is barred by the Double Jeopardy Clause.

1. The mail fraud counts in the indictment alleged that, between December 1977 and December 1981, petitioners and their co-defendants engaged in a scheme to defraud by diverting funds collected from mortgagors on behalf of mortgage companies to their own uses, particularly to capitalize a loan company and other business ventures. More specifically, it alleged that, during the period of the scheme, co-defendant Matsukage was concurrently the president of Pacific Standard Investment and Loan, Inc. (Pacific), and the president of Real Estate Finance Corporation (REFC). Pacific was an industrial loan company authorized by state law to solicit public funds for deposit and to make loans with those funds. REFC, which shared offices with Pacific and had been owned by co-defendant Curtis J. Bernhardt between December 1977 and June 1978, was a mortgage-servicing

company that made agreements with various mortgage companies to collect monthly mortgage payments from homeowners, deposit them into trustee accounts, forward the monthly principal and interest payments to the mortgage companies that they serviced, and pay property taxes and other expenses incurred by the mortgagors when due.

At the same time, petitioners were also officials of Norfolk Investment Co., Ltd. (Norfolk), which shared offices with both Pacific and REFC. Norfolk and its associated companies were established to profit from investments in real estate and other ventures. According to the indictment, petitioners and co-defendant Matsukage engaged in a "community of business interests built upon mutual reliance, transactions and participation with each other to acquire, fund, maintain and expand the business interests of REFC, NORFOLK and NORFOLK's associated companies * * * by fraudulently taking, transferring and diverting monies held in the care and custody of REFC and in the care and custody of PACIFIC" (E.R. 42, 59-60).[1]

The indictment further alleged that in an effort to accomplish that goal petitioners, without explaining the true purposes to which the monies would be put, "caused large amounts of mortgage funds, collected by REFC from homeowners on behalf of their client mortgage companies, to be diverted to PACIFIC, NORFOLK, and NORFOLK's associated companies, in violation of mortgage-servicing contracts between REFC and the mortgage companies" (E.R. 49, 66). Instead of forwarding the mortgagors' payments to the mortgage companies on receipt, petitioners would use the funds to improve Pacific's deficit cash position or provide it with operating cash to support its various business enterprises.

---

[1] "E.R." refers to the excerpt of record in the court of appeals.

The first 29 mail fraud counts (counts 2-30) alleged the mailings of mortgage payments by the victimized mortgagors to REFC in self-addressed envelopes. Most of the remaining mail fraud counts involved mailings allegedly designed by petitioners and their co-defendants to lull the victimized mortgage companies into believing that the monies collected were being properly applied to the payment of property taxes and to servicing the mortgages in accordance with the collection contracts.

Petitioners and some of their co-defendants moved to dismiss the indictment. Among other things, they argued that the indictment failed to demonstrate any causal relationship between the mailings, which they maintained were merely the result of preexisting contractual agreements, and the consummation of the fraudulent scheme. On July 2, 1985, a magistrate, relying on *Parr* v. *United States*, 363 U.S. 370 (1960), recommended dismissal of counts 2-30 (E.R. 385-394). In *Parr*, this Court held that tax statements and receipts routinely sent by a school district in accordance with preexisting legal requirements were not mailed in furtherance of a scheme to defraud. In this case, the magistrate wrote: "[T]he mailings described in Counts 2 through 30 were [as in *Parr*] sent out regularly and routinely as required by preexisting servicing contracts with REFC's various mortgagors. The checks ultimately alleged to have been sent in by the mortgagors would have been mailed even if the scheme to defraud had not existed" (E.R. 392-393).

The magistrate's recommendation was appealed to the district court, but on July 29, 1985, that court adopted the recommendation and dismissed counts 2-30 (E.R. 525). The next day, July 30, 1985, the district court began jury selection for trial on the remaining 45 counts, and the trial

began on July 31, 1985.[2] On August 20, 1985, the government filed a notice of appeal from the July 29 order dismissing counts 2-30. The trial on counts 1 and 31-74 proceeded while the appeal on counts 2-30 was pending.

On September 30, 1985, at the conclusion of the government's case-in-chief, the trial court granted a judgment of acquittal on counts 1 and 31-74 pursuant to Fed. R. Crim. P. 29(a). Addressing the conspiracy count, the court concluded (Pet. App. A36) that the evidence was insufficient to show "any agreement or conspiracy to commit either mail fraud or wire fraud against the United States, nor * * * that [petitioners], or either of them, had the intent to commit either mail fraud or wire fraud or fraud against the United States" (*id.* at G4-G5). With respect to the remaining counts, the court held that the evidence was insufficient to demonstrate "that [petitioners], or either of them, were participants in any scheme or artifice to defraud, or any scheme or artifice to obtain money or property by false or fraudulent pretense alleged in the superseding indictment" (*id.* at G5-G6). Finally, the court held that no rational trier of fact could conclude beyond a reasonable doubt from all the evidence presented in the case that the mails were used for the purpose of executing any scheme or artifice to defraud (*id.* at G6).

2. The court of appeals reversed the trial judge's order dismissing counts 2-30. It reasoned that, by contrast with *Parr* v. *United States, supra,* the homeowners' duty to make payments to REFC stemmed not from an unrelated legal obligation imposed by the State, but from private servicing contracts between REFC and various mortgage

---

[2] The trials of the defendants were bifurcated. Co-defendants Curtis J. Bernhardt and Carl J. Bernhardt have not yet been tried. Co-defendant Daniel R. Matsukage entered pleas of guilty to the conspiracy count, one mail fraud count, and one wire fraud count. Matsukage is now deceased.

companies. As parties to the contracts through their control of REFC, petitioners retained the power to control REFC's legal obligations under the contracts and, therefore, the payments by homeowners to REFC. That arrangement, which permitted petitioners to divert from the mortgage companies payments mailed by mortgagors, was a crucial element of the fraudulent scheme. Pet. App. A21-A29.

The court also rejected petitioners' argument that, as a result of the district court's judgment of acquittal on counts 1 and 31-74, the trial of counts 2-30 should be barred by the principles of collateral estoppel. Citing *Ashe* v. *Swenson*, 397 U.S. 436 (1970), the court noted the requirement that, in order for collateral estoppel to apply, the issue must be one of ultimate fact that was necessarily determined against the government in a previous prosecution (Pet. App. A34). The court at the outset found it "not so clear" whether that requirement was met in this case (*ibid.*). The "sweeping and highly generalized" nature of the district court's factual determinations (*id.* at A38) forced the court of appeals to "speculate about the reasons for the acquittal" (*ibid.*). Ultimately, the court held, "[t]hat the government failed to prove that [petitioners] conspired (count 1) or that they hatched the scheme charged against them in counts other than 2 through 30, does not imply by analogy to [*Ashe*], that it was therefore not 'rationally conceivable' that they committed the offenses in the discrete counts of 2 through 30" (*id.* at A42 (quoting *Ashe*, 397 U.S. at 445)).

ARGUMENT

1. Relying on *Parr* v. *United States*, 363 U.S. 370 (1960), petitioners claim (Pet. 24-25) that, because the mailings alleged in counts 2-30 were made pursuant to a

legal obligation and were not themselves induced by misrepresentations, those counts were properly dismissed. The court of appeals properly rejected that contention.

In *Parr,* the defendants, who were members of the local school board, were required by law to assess and to collect taxes. Fulfilling these responsibilities by causing the mailings of letters, tax statements, checks, and receipts, they subsequently misappropriated some of the tax monies they received to their own use. The Court held that those mailings were not made for the purpose of executing a scheme to defraud alleged as a violation of 18 U.S.C. 1341, as the school board was merely causing the mailing of and receiving items that the law required to be mailed in any event.

By contrast with *Parr,* although the homeowners in this case were required to remit mortgage payments, their obligation to remit them to REFC did not stem from a preexisting, unrelated legal requirement but from private agreements between REFC and the mortgage companies that it serviced. Those agreements, the indictment alleged (E.R. 58, 68), enabled petitioners and their co-defendants to inject themselves into the collection process and, by sending preaddressed mortgage payment envelopes to homeowners, to divert the submission of mortgage payments to REFC. The agreements and the ensuing mailings were, therefore, crucial ingredients engineered by petitioners and their co-defendants for effectuating the fraudulent scheme alleged in the indictment. Cf. *United States* v. *Green,* 786 F.2d 247, 250 (7th Cir. 1986) (although mailing of accident report notices is required by law, the mailings were used with the specific intent to defraud recipients); *United States* v. *Mitchell,* 744 F.2d 701, 701 (9th Cir. 1984) (fraudulent scheme triggered legally required mailings necessary to obtain approval of condominium project); *United States* v. *Primrose,* 718

F.2d 1484, 1491 (10th Cir. 1983) (mailings of payment warrants, although required by law, necessary to effectuation of kickback scheme), cert. denied, 446 U.S. 974 (1984); *United States* v. *Bright,* 588 F.2d 504, 509 (5th Cir.) (mailing of creditor notices required by law triggered by fraudulent scheme), cert. denied, 440 U.S. 972 (1979).

It does not matter that the envelopes sent to the homeowners for the remittance of payments were addressed correctly, contained no misrepresentations, and were otherwise not misleading (Pet. 24-25). As the Court explained in *Parr,* 363 U.S. at 390, if the mailing was a step in the plot it is inconsequential that the mailings were innocent in themselves. Thus, the decision below does not conflict with *Parr,* as petitioners claim; rather, *Parr* supports the decision below.[3]

2. Petitioners also renew in this Court their contention (Pet. 14-23), which the court of appeals rejected, that even if counts 2-30 were improperly dismissed petitioners should escape prosecution on those counts by application of the principles of collateral estoppel. That fact-bound contention does not merit review and was properly rejected.

Although petitioners contend that there is a conflict between the decision below and the decisions of this Court and various courts of appeals, they cite no legal principle on which the court below differed with any other court. Petitioners simply disagree with the court below as to what issues were necessarily decided when the district court entered a judgment of acquittal on counts 1 and 31-74:

---

[3] The disposition of this case need not await the Court's decision in *Schmuck* v. *United States,* cert. granted, No. 87-6431 (May 16, 1988). That case presents the different question whether mailings of motor vehicle title documents by innocent purchasers of used automobiles were sufficiently related to a fraud scheme involving the changing of the vehicles' odometer readings to support a mail fraud conviction.

petitioners contend that the district court necessarily determined that they did not participate in the scheme or artifice to defraud that forms the basis for counts 2-30, but the court of appeals concluded otherwise. The dispute between petitioners and the court of appeals as to what the district court necessarily determined is not the sort of issue that requires resolution by this Court.

Moreover, the judgment of the court of appeals is correct—for a reason that the court of appeals did not have to reach given its reading of the record—even if we assume, arguendo, that the issue of ultimate fact that petitioners now seek to foreclose is one that the district court necessarily determined against the government in the context of counts 1 and 31-74. Because bifurcation of the charges resulted from petitioners' partially successful motion to dismiss, and not from any effort by the government to prosecute the charges seriatim, the doctrine of collateral estoppel does not apply to this case at all.

The modern doctrine of collateral estoppel, as a component of the Double Jeopardy Clause, stems from *Ashe* v. *Swenson,* 397 U.S. 436 (1970). *Ashe,* unlike this case, involved a deliberate effort to prosecute the defendant in two separate proceedings. Although the defendant was charged in six separate counts with robbing six poker players, the State elected to try him first for robbing only one of the poker players, and then (after acquittal on that charge) for robbing another. See 397 U.S. at 457 (Brennan, J., concurring). In the present case, by contrast, the government had no wish to separate the trial of counts 2-30 from the trial of the other 45 counts. Rather, it was the actions of the defendants (in filing a motion to dismiss) and the trial court (in granting that motion as to counts 2-30) that led to the division of the indictment into two separate trials.

This Court's cases show that collateral estoppel does not apply to such a situation. In *Ohio* v. *Johnson,* 467 U.S. 493 (1984), the defendant, like petitioners here, had persuaded the trial court erroneously to dismiss certain charges, and he argued that collateral estoppel (stemming from the "implied acquittal" of those charges that the defendant argued was implicit in his conviction for lesser included offenses) barred the State from any further pursuit of the erroneously dismissed charges. This Court, in disagreeing, observed that, "in a case such as this, where the State has made no effort to prosecute the charges seriatim, the considerations of double jeopardy protection implicit in the doctrine of collateral estoppel are inapplicable" (467 U.S. at 500 n.9). That principle directly controls this case.[4]

The United States Court of Appeals for the Fourth Circuit recently applied the principle stated in *Ohio* v. *Johnson* to a case very much like the present one. In *United States* v. *Ashley Transfer & Storage Co.,* No. 87-5153 (Oct. 3, 1988), the defendants were charged with

---

[4] The principle stated in *Ohio* v. *Johnson* accords with this Court's broader double jeopardy jurisprudence, which generally holds the defendant and not the government responsible for successive prosecutions that result from the defendant's voluntary actions rather than any governmental effort to divide a case into successive prosecutions. See, *e.g., United States* v. *Jeffers,* 432 U.S. 137, 152 (1977) (plurality opinion) (footnote omitted) (Double Jeopardy Clause no bar to successive prosecutions for greater and lesser included offenses when defendant "elects to have the two offenses tried separately and persuades the trial court to honor his election"); *United States* v. *Scott,* 437 U.S. 82, 98-99 (1978) (government not barred by Double Jeopardy Clause from retrying defendant when defendant elects to seek midtrial dismissal on grounds unrelated to guilt or innocence); *United States* v. *Dinitz,* 424 U.S. 600, 606-607 (1976) (defendant may be retried after a mistrial, even if there was no "manifest necessity" for the mistrial, if the mistrial has been declared at the defendant's request); see also *Ricketts* v. *Adamson,* No. 86-6 (June 22, 1987), slip op. 9.

both Sherman Act conspiracy (15 U.S.C. 1) and conspiracy to defraud the United States in violation of 18 U.S.C. 371. Both crimes consisted of the same conspiratorial acts, but the charges were not multiplicitous because each statutory crime requires proof of a fact that the other does not. See generally *Blockburger* v. *United States,* 284 U.S. 299 (1932). The defendants nevertheless sought dismissal of one of the two charges on the ground of multiplicity, and during the trial the district court erroneously dismissed the conspiracy-to-defraud charge. The jury then acquitted the defendants on the Sherman Act charge. The court of appeals reversed and remanded for trial on the Section 371 count, rejecting the defendants' argument that the government was collaterally estopped from proving the conspiracy alleged in that count. Although the court agreed with the defendants that the jury had necessarily determined that they were not participants in the conspiracy alleged in both counts (slip op. 11-13), the court applied *United States* v. *Scott,* 437 U.S. 82, 98-99 (1978), and *Ohio* v. *Johnson, supra,* to determine that relitigation of that issue in the context of the as-yet-untried count was not barred (slip op. 14). "Where, as in this case, the defendants' choice and not government oppression caused the successive prosecutions, the defendants may not assert collateral estoppel as a bar against the government any more than they may plead double jeopardy" (*ibid.*).

The reasoning of the Fourth Circuit is, we submit, sound, and it provides a sufficient ground for permitting the trial of counts 2-30 notwithstanding the acquittal on counts 1 and 31-74. After all, counts 2-30 of the indictment have never been tried. As to those counts, then, petitioners "ha[ve] not been deprived of [their] valued right to go to the first jury; only the public has been deprived of its valued right to 'one complete opportunity to convict those who have violated its laws.' " *Scott,* 437 U.S. at 100

(quoting *Arizona* v. *Washington*, 434 U.S. 497, 509 (1978)); see also *Standefer* v. *United States*, 447 U.S. 10, 22-23, 25 (1980).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOHN F. DE PUE
Attorney

OCTOBER 1988

---

[5] The decisions on which petitioners rely (Pet. 18-22) in no way contradict this analysis. Only three of those cases even pertain to the doctrine of collateral estoppel, and all three cases involved government efforts to prosecute related charges seriatim rather than a single indictment that was carved up into two or more prosecutions as a result of actions by the defendants and the courts. See *Ashe* v. *Swenson*, *supra*; *United States* v. *Baugus*, 761 F.2d 506 (8th Cir. 1985); *United States* v. *Allen*, 539 F. Supp. 296 (C.D. Cal. 1982). All of the other cases that petitioners cite concern aspects of the Double Jeopardy Clause other than collateral estoppel. See *United States* v. *Scott*, *supra*; *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564 (1977); *United States* v. *Maker*, 751 F.2d 614 (3d Cir. 1984), cert. denied, 472 U.S. 1017 (1985); *United States* v. *Genser*, 710 F.2d 1426 (10th Cir. 1983); *Carter* v. *Estelle*, 677 F.2d 427 (5th Cir. 1982), cert. denied, 460 U.S. 1056 (1983); *Sedgwick* v. *Superior Court*, 584 F.2d 1044 (D.C. Cir. 1978), cert. denied, 439 U.S. 1075 (1979). To the extent those cases are relevant at all, they support rather than undercut the analysis that we have advanced. See *Ashley Transfer*, slip op. 14 (relying on *Scott*); note 4, *supra*.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—241-699/60718